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Article

The Maintenance of Mutual Confidence: Sentimental Strategies at the Adultery Trial of Henry Ward Beecher

Laura Hanft Korobkin*

PROLOGUE: CRISIS OF CONFIDENCE IN THE COURTROOM

Between July 1874 and July 1875, the most important subject of discussion in America was New York author and editor Theodore Tilton's charge that Henry Ward Beecher had committed adultery with Tilton's wife, Elizabeth. Beecher, the nation's foremost preacher, was a national symbol of morality, idealism, and self-realization. His Sunday sermons attracted thousands weekly and were read across the country by many thousands more. His writings included not only weekly sermons and essays, but popular volumes of advice to young men, a life of Jesus, and a best-selling novel, *Norwood*. Son of an

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important New England minister, brother of Harriet Beecher Stowe and Catherine Beecher, Henry Ward Beecher and his family were considered embodiments of the American spirit: democratic, religious, energetically moral.¹

The scandal about the preacher and Mrs. Tilton had been simmering since November 1872, when free-love advocate Victoria Woodhull published the accusation in her *Woodhull and Claflin's Weekly*,² but when Beecher finally authorized his Brooklyn Church to investigate the charges in July and August of 1874, more than thirty reporters a day attended the church's hearings. Media preoccupation with the case was said to be unparalleled in journalism.³

1. On Beecher's cultural importance, see generally William G. McLoughlin, *The Meaning of Henry Ward Beecher: An Essay on the Shifting Values of Mid-Victorian America, 1840-1870* (New York: Knopf, 1970); Paul A. Carter, *The Spiritual Crisis of the Gilded Age* (DeKalb: Northern Illinois Univ. Press, 1971); Clifford E. Clark, Jr., *Henry Ward Beecher: Spokesman for a Middle-Class America* (Urbana: Univ. of Illinois Press, 1978); Altina L. Waller, *Reverend Beecher and Mrs. Tilton: Sex and Class in Victorian America* (Amherst: Univ. of Massachusetts Press, 1982). While it is important to this Article to recognize Beecher as a national symbol of religious virtue, it is not my purpose to analyze his doctrines in detail. It is worth noting, however, that though historians agree that Beecher was an enormously important moral and religious figure whose fall triggered a national crisis of confidence in the values he represented, they disagree sharply about just what those values were. To Clark, Beecher symbolized "the Victorian cultural ethos." At a time "when industrialization and the growth of cities were changing the face of the nation, he had reaffirmed the morality of an earlier, more rural America." C. Clark, 225. People who were "frightened by the rapid and chaotic social change" had found Beecher reassuring; consequently, if the leading spokesman for Victorian morality was unmasked as "a fraud and a charlatan, then how could anyone still believe in the cultural system he espoused?" Ibid., 198. Altina Waller's book-length examination of the case makes Beecher a champion, not of old-fashioned values, but of "freedom from the rigidity of traditional institutions—family, church, or town," an advocate of love and "affinity" over obligations to family, a believer in the value of social mobility and material success, the perfect preacher for "a congregation of young men whose chances for survival in a changing world required a geographic, economic, and intellectual departure from the past." Waller, 67, 109. To Waller, the trial called into question not the morality of an earlier, more rural America, but Beecher's radical doctrines of emotional "affinity," raising suspicions that Beecher's "Doctrine of Love" might be the first step down a slippery slope that would end in promiscuous and irreligious cohabitation.

2. Victoria Woodhull, *Woodhull and Claflin's Weekly*, 2 November 1872.

3. See the description presented in Carter, 115. As the scandal grew in intensity, a number of quickly published books appeared on the market, reprinting the "documents" in the case and offering biographies of the people involved. A large number appeared between the time that Tilton filed his complaint (August 1874) and the time the trial started (January 1875). A representative sample includes: Charles F. Marshall, *The True History of the Brooklyn Scandal: Being a Complete Account of the Trial of Henry Ward Beecher, of Plymouth Church, Brooklyn, Upon Charges Proffered by Theodore Tilton, Including All the Original Letters, Documents, and Private Correspondence with Biographies of the Leading Actors in the Great Drama* (Philadelphia, Chicago, and St. Louis: National Publishing Co., 1874); Francis P. Williamson, *Beecher and His Accusers: A Complete History of the Great Controversy, Including the Life of Henry Ward Beecher, together with Pen and Ink sketches of the Persons Prominently Involved, A full record of all the fact, Leading Comments, Choice Extracts, characteristic anecdotes and Important Revelations from reliable private sources* (Philadelphia: Flint & Co., 1874); *The Great Brooklyn Romance, All the Documents in the Famous Beecher-Tilton Case, Unabridged* (New York: Paxton, 1874); A Class-mate of H. W. Beecher, *The Veil Removed; or, Henry Ward Beecher's Trial and Acquittal Investigated. Love Demonstrated in Plain Dealing. The Congregational Council Reviewed* (New York: n.p., 1874).

The *New York Herald* declared in July that “no event since the murder of Lincoln has so moved the people as this question.”⁴ The public’s obsession with the case became so intense that E. L. Godkin, editor of *The Nation*, wrote to James Russell Lowell that he was escaping to Vermont because the “nastiness of it, and the newspaper rhetoric on it” had made New York “almost uninhabitable just now.”⁵ Interest in the case throughout what came to be called “scandal summer” was much more than local; in a single day in August, for example, the *Chicago Tribune* gleefully devoted 22 columns to publishing the Tiltons’ marital correspondence, and articles about the case began to appear regularly in newspapers as far away as Marseilles and Rome.⁶ During the second half of 1874, the *New York Times* ran 105 stories and 37 editorials about the scandal.

The subsequent civil trial on Tilton’s tort charges of criminal conversation and alienation of affection lasted for more than six months, from January to July 1875.⁷ Even after so many months of

4. Quoted in Carter, 114; Milton Rugoff, *The Beechers: An American Family in the Nineteenth Century* (New York: Harper & Row, 1981), 493.

5. E. L. Godkin to James Russell Lowell, 30 July 1874, in *The Gilded Age Letters of E. L. Godkin*, ed. William Armstrong (New York: SUNY Press, 1974), 212.

6. On July 22, 1874, the *Chicago Tribune* published five columns on “The Beecher Explosion.” On August 13, in a “major and highly sensational scoop,” nearly five pages, twenty-two full columns, were devoted to the publication of the Tiltons’ letters, which were then picked up and published in the New York papers. Lloyd Wendt, *Chicago Tribune: The Rise of a Great American Newspaper* (Chicago: Rand McNally, 1979), 248-50. Robert Shaplen reports that “with the case taking whole pages, national and world news was often reduced to one or two lines.” Robert Shaplen, *Free Love and Heavenly Sinners: The Story of the Great Henry Ward Beecher Scandal* (New York: Knopf, 1954), 206-14. Shaplen gives the most complete discussion of media coverage and popular response to the scandal and trial. He includes detailed descriptions of both national and international articles, and of the behavior of crowds before and during the trial.

7. Although the name of the common law tort is “criminal conversation,” this was a *civil*, not a criminal, case. Invented in the last decades of the seventeenth century, criminal conversation soon replaced the duel as a “civilized” means for a cuckolded husband to obtain “satisfaction” from his wife’s seducer. The suit is for money damages only; no prison term can result, and the damages are paid directly to the “injured” plaintiff, not as a fine to the government. The word “criminal” characterizes the sexual “conversation” of wife and lover as wrongful or sinful, not as a violation of the state’s criminal statutes. Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford: Oxford Univ. Press, 1990), 231-44. The civil status of the Beecher-Tilton case is important because it framed the case as a commercial dispute over money between two private men. Legally, the matter concerned no one but Henry Ward Beecher and Theodore Tilton. In contrast, criminal cases generally image crime as a threat to the order and security of society as a whole; prosecutions are therefore brought by the ultimate injured party—the state—rather than by the immediate individual victim. This distinction was, perhaps understandably, blurred or lost completely in both the forensic and the media discourse surrounding the scandal and trial. Lawyers linked the verdict to the fate of all civilization, the future of Christianity, and the ongoing existence of morality. Newspapers focused on the alleged act of adultery at the heart of the case, and, disregarding legal niceties, described Beecher as “under the suspicion of a dark crime.” *The Beecher Trial: A Review of the Evidence. Reprinted from The New York Times of July 3, 1875, with some Revisions and Additions* (New York: The New York Times, 1875), 33. Even such generally well-informed modern historians as Altina Waller have mischaracterized the case as criminal. Waller, 11. The law’s circumscribed civil story was simply overpowered by the universal sense that something much larger was profoundly at stake. Consequently, the national “conversation” about the case was carried on in the broadest

saturation-level publicity, the trial stimulated heightened media interest. During the trial, every major newspaper in the country devoted daily front-page coverage to the case, "pushing politics off the front pages for months at a time."⁸

In suing the man who had once been his best friend, and who had performed the marriage ceremony for the Tiltons twenty years earlier, Tilton had demanded \$100,000 damages as compensation for the injuries to *him* caused by his wife's alleged adultery with Beecher.⁹ Neither party nor witness, Elizabeth Tilton nevertheless appeared daily in the courtroom, a silent, constant presence among the boisterous spectators. Though the central question in the case was whether she and Beecher had committed adultery, her legal "interests" were not technically at issue in the case, and she was unrepresented by counsel.¹⁰ Nevertheless, conversations with her

possible terms.

Beecher was never indicted on criminal charges. In October 1874, before the criminal conversation trial began, Beecher swore out a criminal complaint which led to indictments against Tilton and his friend Frank Moulton on criminal charges of malicious libel. When the criminal conversation case ended inconclusively, Moulton "clamored to be tried" on the libel charges, knowing that in this case Elizabeth Tilton "would be subpoenaed and both she and the pastor would be rigorously cross-examined." The suit was dismissed, whereupon Moulton sued Beecher for malicious prosecution, a charge that was also eventually dismissed. Shaplen, 260; Marshall, 606-09. In 1872, Victoria Woodhull was briefly imprisoned at the request of morality-warden Anthony Comstock on federal charges of sending obscene material through the mails, the "materials" at issue being the *Woodhull & Claflin's Weekly* article that began the scandal. Shaplen, 162-64.

8. Wendt, 248.

9. Tilton's complaint alleged, in the verbal formula required for the torts of criminal conversation and alienation of affection, that Beecher's adultery with his wife had caused the alienation of her affections from him, by reason of which "the plaintiff has wholly lost the comfort, society aid and assistance of his said wife," causing "great distress in body and mind to the damage of the plaintiff one hundred thousand dollars." *Tilton versus Beecher, Action for Crim. Con.* (New York: McDivitt and Campbell, 1875), I:3. (Subsequent transcript references will be made in the footnotes by reference to volume and page number.) The amount of damages sought was highly unusual, even for such cases. When it became apparent that the public was reacting with horror and distaste to the idea that Tilton sought to profit financially from his wife's disgrace, he withdrew all claims for money damages, declaring that he only wanted vindication and truth. See, for example, the closing argument for Tilton (III 907), declaring that he "disdains the idea of touching the gold" of Beecher and wants only the impartial hearing he could not get from Beecher's church council.

10. Although Elizabeth Tilton's reputation and future life were very much at stake, she was not a party to the litigation. A verdict for Tilton would not have rendered her liable to pay damages, nor would it have served as a legally binding judgment or finding against her in any related litigation, such as a criminal adultery prosecution. The case was carried on solely between the two men; it is in this sense that her "interests" were not involved. In addition, the long-standing ban on spouses testifying for or against each other in any litigation disqualified her from appearing as a witness. Simon Greenleaf justified the ban on public policy grounds in his *Treatise on the Law of Evidence*, declaring:

It is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence.

Simon Greenleaf, *A Treatise on the Law of Evidence* (Boston: Little Brown, 1854), Sec. 334-5, 495-6. On this topic, see also William Bowdesley Best, *Principles of the Law of Evidence; With*

were recounted from the witness stand, her intimate letters to her husband were read in the public courtroom, and she was continually described and assessed by counsel for both sides.¹¹

Popular involvement in the trial was intense. Huge crowds surged around the courthouse. Hopefuls waited all night for a chance to get a ticket for one of the limited spectator seats inside the courtroom, while “as many as three thousand persons a day were turned away, affording near-by saloons a booming business.”¹² Scalpers sold the free tickets for as much as five dollars each. Immense bouquets of flowers were delivered to Beecher and to Tilton where they sat with counsel, until the courtroom reeked of the odors of hothouse plants and the competition by each party’s supporters to produce ever more magnificent and showy bouquets thoroughly upstaged the ongoing interrogation of witnesses on the stand.¹³ Jurors and spectators

Elementary Rules for Conducting the Examination and Cross-examination of Witnesses (Albany: Weare C. Little, 1875), Sec. 127. Yet even Beecher’s attorneys called Elizabeth “the true defendant in the cause—she whose lips are sealed and whose hands are tied, while the battle is waging over her body” (II 9). For strategic reasons, Tilton offered to waive the spousal privilege if his wife wished to testify for Beecher. As he no doubt expected, however, the trial judge refused the offer of waiver (III 313-14).

The enforced silence of Elizabeth Tilton was one of the structural preconditions for the trial’s uncircumscribed production of testimonial and argumentative fictions. While this Article does not take up the “absent presence” of Elizabeth Tilton in detail, several recent works have focused on her place in the scandal and the trial. On the forensic construction of Elizabeth Tilton as a character of fiction, and the use of Charles Reade’s 1866 bestseller *Griffith Gaunt* to interpret Elizabeth Tilton to the jury, see Laura Hanft Korobkin, “Silent Woman, Speaking Fiction: *Griffith Gaunt* at the Trial of Henry Ward Beecher,” in *The New Nineteenth Century: Feminist Readings of Underread Victorian Texts*, Wellesley Studies in Critical Theory, Literary History, and Culture, ed. Barbara Harman and Susan Meyer (New York: Garland Publishing, forthcoming). For a sympathetic and perceptive investigation of what the relationship with Beecher might have meant to Elizabeth Tilton, see Richard Wightman Fox, “Intimacy on Trial: Cultural Meanings of the Beecher-Tilton Affair,” in *The Power of Culture: Critical Essays in American History*, ed. Richard Wightman Fox (Chicago: Univ. of Chicago Press, 1993), 103-32. For a psychological reading of Elizabeth Tilton’s sexuality and her place in the scandal, see Waller, 54-63.

11. See, for example, testimony of Theodore Tilton, II 391, 396-98 (recitation of Mrs. Tilton’s “confessions of guilt to her husband”); II 402 (Beecher told Tilton that “their sexual commerce had been through love and not through lust”); II 443 (Beecher never denied the “criminal intercourse” with Elizabeth, but insisted that he should be blamed for it); II 454-57 (series of questions to Tilton about Elizabeth’s character, “pride in woman’s chastity,” reading habits, religious opinions, “the delicacy of her behavior toward the other sex,” whether she was “of a sympathetic and affectionate nature”). During the opening and closing arguments, lawyers for both sides commented freely on her “middle age” and “gray hairs” (III 649, III 826). Beecher’s lawyers characterized her as a “child,” an “unhappy little woman” engaged in a “violent and protracted struggle between her passion and her sense of duty, which had destroyed her health and unsettled her reason” (II 49, 48). Tilton’s attorneys refused to agree that she had “an exalted and perfect character” (III 887), stressing instead her “shame and infamy,” her “weakness” and her “fall” (III 889-92).

12. Shaplen, 216.

13. For descriptions of the carnival atmosphere of the trial, see the daily reporter’s commentaries in the transcript, especially day 19 (“a stranger might have thought himself in a place of amusement”) (I 459); Shaplen, 216; Milton Rugoff, *America’s Gilded Age: Intimate Portraits from an Era of Extravagance and Change 1850-1890* (New York: Henry Holt, 1989), 207-08. In “An Afternoon at the Beecher Trial,” an *Overland Monthly* reporter describes the

fainted in the June heat wave and were carried out of the courtroom. Trial transcripts, printed daily in several New York newspapers, were also sold to the public in booklet form as the trial continued.¹⁴

Final arguments to the jury lasted sixteen full days. On July 2, the 112th day of trial, after eight days of deliberation and fifty-two ballots, the jury announced that they were deadlocked. "It is a question of fact, a question of the veracity of witnesses on which we do not agree, your Honor, and I would say I think there is not a possibility of an agreement in this jury," explained Chester Carpenter, the jury's foreman. Judge Neilson reluctantly dismissed the jurors, and the case ended without a verdict.¹⁵ When Beecher entered Plymouth Church that evening for his weekly prayer meeting, a crowd on the sidewalk cheered, while inside devoted parishioners sobbed.¹⁶

In the following days and weeks, the media delivered a variety of verdicts. *Harper's Weekly*, *Scribner's Monthly*, and many others stoutly insisted that the nonverdict was tantamount to an acquittal, assuring their readers that "the majority of the jury in the late trial, like the majority of the public, held Mr. Beecher guiltless of the crime charged against him, and the result of the trial is virtual acquittal."¹⁷ Many others were not so forgiving. In the *Nation*, Godkin editorialized: "It can hardly be said that this is a victory for anybody, but it is something very like a defeat for Mr. Beecher." Whether Beecher was innocent or guilty of the charge, Godkin declared, "It is a pitiful story, which must remain a permanent blot on his reputation, and must considerably diminish if not destroy his influence as a moral teacher."¹⁸ In a lengthy assessment of the evidence three days after the trial's conclusion, the *New York Times* concluded that the facts "tell heavily against Mr. Beecher," something that "will be universally

trial as a "matinee" and "reviews" it as drama. "An Afternoon at the Beecher Trial," *Overland Monthly*, August 1875, 182-94. Samuel Leland Powers provides a charming description of both the trial and Beecher's Sunday sermons during the trial from the point of view of a very young lawyer. Samuel Leland Powers, *Portraits of a Half Century* (Boston: Little Brown, 1925). On the delivery of floral arrangements, see Walter Earle, *Shearman and Sterling 1873-1973* (New York: n.p., 1973), 117-19. E. L. Godkin, who was disgusted by the scandal and considered Beecher a fraud, likened the flowers in the courtroom to "wreaths round the man-hole of a sewer." Quoted in C. Clark, 227. On the scalping of tickets, see the *Overland Monthly* article and Rugoff, *The Beechers*, 496.

14. Complete trial transcripts were published daily in several New York newspapers, including the *New York Tribune*. The *Tribune's* reporter became an important functionary in the courtroom; Judge Neilson occasionally asked him to read back earlier testimony. 171. The *Tribune's* daily transcripts became the basis for McDivitt and Campbell's three-volume edition of the trial. See also advertisements for the "Pictorial History of the Beecher-Tilton trial" for sale "at all news depots price 30 cents," and classified ads for "agents wanted for the True History of the Brooklyn Scandal," in *Frank Leslie's Illustrated Newspaper*.

15. III 1041-42.

16. Shaplen, 255.

17. C. Clark, 224-25.

18. Editorial, *The Nation*, 8 July 1875, 22-23.

regretted, for it is a mournful sight to see a great preacher of religion resting even under the suspicion of a dark crime.”¹⁹ Newspapers from Kentucky to London were more blunt, calling Beecher “a dunghill covered with flowers” and asserting that he had “acted with an imbecility that would have disgraced an uneducated girl.”²⁰

In the following year, Plymouth Church voted Beecher an additional \$100,000 salary to cover his legal expenses; sent copies of the final arguments in his defense to “every library, college, and important church in the country”; and convened a second Church Council which again acquitted Beecher of all charges.²¹ Beecher continued to be a popular preacher and lecturer, and some historians assert that he recovered his position and the faith of his followers,²² while others conclude that he was taken less seriously as a religious leader, that he became a butt of mockery even in the religious press, and that “his lectures were often frequented by curiosity seekers rather than admiring parishioners.”²³ The Tiltons separated but never divorced. Theodore Tilton’s professional career was ruined by the scandal; he eventually “fled to Paris where he lived in poverty, writing poetry and playing chess.”²⁴ Elizabeth Tilton was supported for a time by members of Beecher’s congregation, who hired her as a tutor. When she issued an unambiguous admission of the affair in 1878, however, she was swiftly excommunicated.²⁵ As Altina Waller concludes, “she grew old in Brooklyn, a virtual outcast, sustained only by the devotion of her daughter and a small radical group known as the Christian Friends.”²⁶ Gradually, the scandal that “cast a stain upon the fair name of the Great Republic of the West,” and the trial that counsel had confidently declared would “loom larger in history than any which has taken place for eighteen centuries” were forgotten.²⁷

19. *The Beecher Trial: A Review of the Evidence*, 33.

20. *Louisville Courier Journal*, *London Daily Telegraph*, quoted in Shaplen, 258.

21. Paxton Hibben, *Henry Ward Beecher: An American Portrait* (New York: Doran, 1927), 282.

22. C. Clark, 224-29.

23. Waller, 146; Rugoff, *The Beechers*, 499-501.

24. Waller, 11; Rugoff, *America's Gilded Age*, 210.

25. In a public letter to her legal advisor, reprinted in most major American newspapers, Elizabeth said, “after long months of mental anguish, I told . . . a few friends whom I had bitterly deceived that the charge brought by my husband, of adultery between myself and the Reverend Henry Ward Beecher was true, and that the lie I had lived so well the last four years had become intolerable to me. That statement I now solemnly re-affirm, and leave the truth to God, to whom I also commit myself, my children, and all who must suffer” Even three years after the trial, the *New York Times* devoted four columns on page one to the story of Mrs. Tilton’s letter, Beecher’s denials, and the comments of family, friends, and lawyers. *New York Times*, 16 April 1878, 1. As Rugoff notes, “[I]t was the only statement she had ever made without pressure, and it has the ring of truth; but it came too late.” Rugoff, *America's Gilded Age*, 210.

26. Waller, 145; Shaplen, 272.

27. Marshall, 13; I 92.

Though the immediacy of the Beecher-Tilton scandal has long since faded, its year-long reign as a national obsession invites analysis. In a decade filled with scandals about the vices and corruption of public figures like Grant and Tweed, what about this one led newspaper-reading Americans to experience it as the most significant event since the death of Lincoln? This Article argues that one important explanation for the case's spectacular notoriety is that both the months of adversarial interrogation and the concentration of interest on the single issue of credibility played into a profound pre-existing cultural anxiety about the difficulty of distinguishing sincerity from hypocrisy. What Paul Carter has called the "obsessive, even compulsive quality" of the nation's involvement in the case becomes more understandable if we think of the trial as a convergence of structure, substance, and national concern about the difficulty of making reliable judgments about other people. Transformed from titillating, gossipy newspaper stories into a formal public trial which became an increasingly undecidable interrogation of hypocrisy, the trial touched one of the country's rawest nerves. Following each day's testimony in their newspapers, Americans saw both a beloved figure and longstanding role model, and the reliability of their own methods of judgment on trial.²⁸

With this cultural context in mind, I will concentrate on the rhetorical strategies deployed by the lawyers in the courtroom, focusing on the forensic use of sentimentality to "solve" the case's central credibility problems and on the contemporary critique of such tactics of jury persuasion. I will also suggest broader connections

28. The Beecher scandal has received a substantial amount of critical attention. Though reaching sharply different assessments of the famous preacher's personal virtue, biographers such as Clifford Clark, McLoughlin, and Hibben see the scandal as critical evidence for the project of understanding the Gilded Age through its most "representative" figure. The introduction to Paxton Hibben's 1927 biography associates Beecher's significance with his representative capacity: he is "a prodigious figure not by blazing a path in any wilderness, but by the fact that his inner experience was identical with that of millions of his fellow countrymen." Hibben, xiv. Clark's biography, titled *Henry Ward Beecher: Spokesman for a Middle-Class America*, attributes Beecher's popularity to his having "articulated the attitudes and values of a new urban middle class that emerged at mid-century," while his life "provides new insight into the relationship between religion and Victorian culture in America during the crucial middle decades of the nineteenth century." C. Clark, 3-4. Social historians, reading the scandal through such situating specifics as the demographics of membership in Beecher's church, the political affiliations of his attorneys, and the editorial slants of the media coverage, argue that it elicited widespread expressions of anxiety about spirituality (Carter), intimacy (Fox, "Intimacy on Trial"), and political and religious rivalries between different denominations and political parties (Waller). Significantly, none of these major studies analyzes the trial or its rhetoric closely. There are two notable exceptions to this communal dismissal of the trial as subject: Carlson and Douglas. Carlson's article uses Ann Douglas's "feminization" thesis to analyze Beecher's defense strategy. Cheree Carlson, "The Role of Character in Public Moral Argument: Henry Ward Beecher and the Brooklyn Scandal," *Quarterly Journal of Speech* 77 (1991): 38-52. Douglas considers the trial briefly and disdainfully, mocking Elizabeth Tilton's intimacy with Beecher rather than analyzing it. Ann Douglas, *The Feminization of American Culture* (New York: Knopf, 1988).

between legal process, literary form, and the historical concerns of culture. Sentimentality's pervasive deployment at an important trial in 1875 tells us a great deal, not just about which literary forms enjoyed popularity during the period, but about the particular anxieties and concerns animating American culture at the time. Yet the "truth" of sentimentality in 1875 was anything but unquestioned. While its use at the Beecher-Tilton trial suggests its continuing power, the trial record also reflects continual attacks on sentimentality as artificial and unpersuasive.²⁹ What makes the Beecher-Tilton trial's million-word transcript an extraordinary site for cultural analysis is the way that it freeze-frames, through its seemingly endless textualized rhetoric, a moment of intense cultural dynamism. Through it we can glimpse the "sentimental synthesis," which had been so splendidly transparent before the Civil War, still exerting a surprising rhetorical dominance even as it jousts uneasily with an antisentimental backlash and an often unstated acceptance of modernist discontinuities.

Section I of this Article sets out the basic assumptions about the literary "narrativity" of trial process that underlie my analysis. Sections II and III use a reading of William Maxwell Evarts's closing argument for Henry Ward Beecher to compare Evarts's rhetorical strategy to sentimental strategies employed by such authors of fiction as Beecher's sister, Harriet Beecher Stowe. In addition to literary sentimentality, I connect Evarts's forensic rhetoric to theories of credibility and "mutual confidence" advanced by nineteenth-century evidence theorists such as William Mowdesley Best and by recent cultural critics such as Karen Halttunen. Section IV examines the era's powerful antisentimentalist critique. After a brief discussion of Tilton's inconsistent challenge to Beecher's sentimental strategy, I

29. While lawyers for both sides indulged in melodramatic, sentimentalized rhetoric without fear of mockery, readings from certain letters and documents elicited vociferous amusement in the courtroom, which the lawyers often exploited. In his summing up for Beecher, for instance, Mr. Porter's reading of "supposed expressions" from the Tiltons' marital correspondence was reported as having "stirred up a breeze of merriment in the audience" (III 557). In an editorial on the case before the trial started, *The Nation* issued a "Lesson for Sentimentalists," warning that the "letters, 'statements,' 'confessions,' and other documents of the parties to the affair" exhibited a use of sentimental language that

seems almost to lose the character of an instrument for the expression of definite propositions—or, in other words, for the communication by one human being to another of formulated thought—and becomes a mere mode of indicating certain states of feeling, like the noises made by the lower animals. On reading their compositions, one has to guess at what they really mean, the only thing certain being that they are either happy or miserable, just as when a dog howls or barks we know that he is either glad or sorry or angry, but cannot well make out what he would have us do. They resemble lower animals too, very strikingly in the absence from their minds of all gradations of feeling, and of all reserve in their intercourse with each other. They seem to have no more power of pursuing a middle course, of making distinctions and allowances, of adapting their expression to circumstances, than our humble friends of the kennel and stable.

3 September 1874, 150.

focus on Mark Twain and Charles Dudley Warner's 1873 novel, *The Gilded Age*, which features a climactic murder trial at which the emotionally seductive rhetoric of an Evarts-like lawyer destroys the jury's rational decision-making capacity. Finally, in the Epilogue I discuss the contrast in literary form between individual trial narratives and the inclusive novel-like transcript of an entire trial or lawsuit.

I. THE TRIAL AS SUBJECT: LITERARY FORM AND LITIGATIVE STRATEGY

In speaking of the "narrativity" of courtroom testimony and argument, and in analyzing courtroom speaking in literary terms such as genre, plot, character, and rhetoric, I am making what has become a basic assumption about the way that legal process works: all litigation is essentially conducted by constructing, presenting, and interpreting narrative versions of past events.³⁰ From the filing of the legal complaint that initiates a lawsuit, through the taking of depositions, to the testimony of witnesses and arguments of counsel at trial, to the verdict itself, and through every phase of the appeal, litigants, lawyers, and judges are engaged in a constant process of narrative shaping and presentation. To win a case, a litigant must transform the complex and ambiguous data of subjective experience into a persuasive narrative. Not only must that narrative be coherent, consistent, and believable, but it must be unambiguously moral, must demonstrate the litigant's entitlement to win (or to defeat) the case.

If litigants and their attorneys are thus continually engaged in writing and telling stories, they do so for practical rather than literary reasons. Significantly, the instrumental importance of such litigative narratives puts their intended *readers* in a uniquely powerful position. The "finder of fact," whether judge or jury, delivers the story-ending

30. There is a lively critical literature on "storytelling in the courtroom." Examples include W. Lance Bennet and Martha Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (New Brunswick: Rutgers Univ. Press, 1981); Robert Hariman, ed., *Popular Trials: Rhetoric, Mass Media and the Law* (Tuscaloosa: Univ. of Alabama Press, 1990); Janice Schuetz and Kathryn Holmes Snedaker, *Communication and Litigation: Case Studies of Famous Trials* (Carbondale: Southern Illinois Univ. Press, 1988), which all present detailed analysis of the production of stories in litigative settings. Bernard Jackson's semiotic analyses have argued with great sophistication that fact construction within legal process is always narrative creation, that the laws governing such creation have a narrative origin, and that legal reasoning is not so much a question of logic and syllogisms as of similarities and differences between stories. Bernard Jackson, *Law, Fact, and Narrative Coherence*, (London: D. Charles Publications, 1988); Bernard Jackson, "Narrative Theories and Legal Discourse," in *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature*, ed. Christopher Nash (New York: Routledge, 1990). In the field of sociology, Pennington and Hastie have used interviews with juries during and after trials to construct complex and persuasive models of the storytelling process through which jurors "impose a narrative organization on evidence." Nancy Pennington and Reid Hastie, "A Cognitive Theory of Juror Decision Making: The Story Model," *Cardozo Law Review* 13 (1991): 519, 523.

verdict that metes out rewards and punishments consistent with the factfinder's determination of "the story thus far."³¹ From the plaintiff's or defendant's point of view, the storytelling "succeeds" only if it convinces the jury-audience. Because courtroom storytelling is thus profoundly contingent on the response it produces, courtroom storytellers inevitably try to minimize uncertainty by shaping the story to elicit a predictable, sympathetic response. Witnesses and counsel frame their stories for maximal appeal to the specific audience of judge or jury, using what they know or infer about jurors' and judges' values, education, and literary familiarity. The particular story told, and the way it is told, represents the teller's best guess about what will persuade the specific audience for whom it is constructed. If the jury can be thought of as "writing" the stories that it hears, those stories are also, importantly, told to "steer" the jury toward a desired interpretation.

My emphasis on the central role of the juror-reader in litigative storytelling has obvious analogies to the work of literary critics who put the reader's interaction with the text at the center of their investigations.³² Response-centered criticism has long argued that meaning is a product of the reader's interpretive activity rather than a function of the text itself. Readers do not approach texts with minds empty of preconceptions; rather, the text must "be thought of as an utterance that has meaning only with respect to a system of conventions which the reader has assimilated."³³ These systems of

31. The jury's verdict, while it provides a formal moment of closure at the end of the trial, may well not be the last narrative in the case. On appeal, a new set of oppositional stories will be told, narratives that will include the "story" of the trial and the alleged errors that were committed there. One or more appeals court decisions will supply additional narrative framings of the case, each with a different emphasis. It is worth noting, however, that because the jury is officially denominated the "finder of fact," questions about the events antecedent to the trial that have been settled by the rendering of the verdict are not technically open on appeal. This gives the jury a special authoring power within the realm of fact. As Kim Lane Scheppele has persuasively argued, however, the distinction between fact and law is often more apparent than real, as fact and law are "mutually constituting—not simply hard to tell apart." Kim Lane Scheppele, "Finding Facts in Legal Interpretation," in *Law and the Order of Culture*, ed. Robert Post (Berkeley and Los Angeles: Univ. of California Press, 1991), 62.

32. The best introduction to response-centered criticism is still the collection of essays edited by Jane Tompkins. *Reader-Response Criticism: From Formalism to Post-Structuralism* (Baltimore and London: Johns Hopkins Univ. Press, 1980). Another major work in the field is Stanley Fish's *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard Univ. Press, 1980). Fish's more recent work, collected in *Doing What Comes Naturally: Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham: Duke Univ. Press, 1989) brings his approaches to texts into the legal arena. Fish engages with explicitly "legal" texts such as appellate court decisions and rules of evidence, but he does not investigate the narrativity inherent in litigation or the production of stories by lawyers and witnesses at trial.

33. Jonathan Culler, "Literary Competence," in *Reader-Response Criticism: From Formalism to Post-Structuralism*, ed. Jane P. Tompkins (Baltimore and London: Johns Hopkins Univ. Press, 1980), 104.

rules and assumptions derive in large part from the reader's wealth of prior experience *as a reader*, that is, the remembered responses the reader has had in the past to similar plots, characters, and language. A reader who has read widely will be able to identify a text from its opening chapter as an epic or a tragedy based on a range of familiar linguistic identifiers such as tone, voice, vocabulary, or event.³⁴ She will consequently have specific expectations about how the story will "turn out," about which characters are to be admired and identified with, which recoiled from with horror. Many of the textual clues that shape a reader's response are linked to aspects of literary genre; once she knows what *kind* of story she is reading, tragedy or farce, hard-boiled detective fiction or soft-core pornography, she has a set of interpretive rules that she can apply with confidence. Different genres represent similar events differently;³⁵ thus, to predict how a particular reader will interpret a story about murder, it would be helpful to know whether the story was told in a manner more similar to *Crime and Punishment* or to the recent film comedy *So I Married an Axe Murderer*.

While any number of "law and literature" scholars have declared that legal process works through storytelling, they have only recently begun to pay attention to the *kinds* of stories told in courtrooms. As Robert Ferguson recently demonstrated in a brilliant study of John Brown's successful self-construction at his murder trial as a "hero of Romance": "we can only tell the stories we know how to tell, and the degree of our understanding—our appreciation—depends on issues of narrative and genre often present but usually missed in studies of the legal process."³⁶ In framing their cases for the jury as stories that

34. Readers who come to texts without experience reading similar works will still be able to interpret and understand them, of course, and will make a host of inferences about what will happen and what to expect based on textual "clues." Even when the genre or approach is quite new to us, however, we come to the text with a wealth of both general and specific interpretive strategies based, in the broadest sense, on our prior experience as readers.

35. This is not to imply that all stories fit neatly into pre-existing genres, or that, once labeled, they will inevitably follow predictable patterns. Much of the pleasure of reading literature involves being surprised by the unexpected. See, e.g., Stanley Fish, *Surprised by Sin: The Reader in Paradise Lost*, (London: Macmillan, 1967). Wolfgang Iser argues that "expectations are scarcely ever fulfilled in truly literary texts," because the confirmation of expectations suggests a didactic purpose and "[m]ore often than not, the very clarity of such texts will make us want to free ourselves from their clutches." *The Implied Reader: Patterns in Communication in Prose Fiction from Bunyan to Beckett* (Baltimore: Johns Hopkins Univ. Press, 1974), 277. In genres such as melodrama, romance, and sentimentality, however, readers often report that their greatest enjoyment is tied to the security of their discursive expectations, their confidence that the rules will be followed in a satisfying way. See Janice A. Radway, *Reading the Romance: Women, Patriarchy and Popular Literature* (Chapel Hill: Univ. of North Carolina Press, 1984).

36. See, e.g. Robert A. Ferguson, "Story and Transcription in the Trial of John Brown," *Yale Journal of Law & the Humanities* 6 (1994): 37-73. Ferguson is one of a small group who have looked closely at issues of genre in litigative storytelling. Others include Susan Staves, whose work on eighteenth-century criminal conversation cases reads them as specific contests of

they “know how to tell,” lawyers inevitably, and often unconsciously, draw on the story-forms most familiar and powerful within the culture at the time. They do so, moreover, not just to make their clients’ claims neatly coherent and thus “tellable,” but to evoke the specific and predictable responses that jurors will have already learned to make *as readers* to stock characters and situations in familiar romances, farces, or sentimental tragedies. By suggesting that the facts of a case constitute a story much like others that jurors know—especially if the analogous stories offer unambiguous moral assessments of character and action—a lawyer can provide jurors with a clear moral framework to use as a guide in making credibility determinations and evidentiary assessments.

A literary mode such as sentimentality—which dominated the Beecher-Tilton trial—can make this task seem easier. Nineteenth-century American sentimental fiction tended to divide the world into the morally unambiguous categories of victim and perpetrator, while its textual strategies aimed to induce an identification with the deserving but abused victim, prototypically a child, slave, or orphan.³⁷ If the victim-hero/ine suffered at the hands of oppressive

interpretation in which the defendants attempted to construct the case as a tragedy while the plaintiff framed it as farce; Claire Dalton, whose deconstruction of contract doctrine includes a revealing study of the gendered literary stereotypes that underlie judicial characterizations of parties; Edward Berenson, whose study of a 1914 French murder case contextualized defense strategy through a study of cultural stereotypes and narratives about women; Daniel Cohen, who reads an 1845 New England murder case through literary stereotypes and narratives of women as seductresses and victims; and Michael Grossberg, whose recent analysis of an antebellum custody case takes up issues of literary characterization of the parties. Susan Staves, “Money for Honor: Damages for Criminal Conversation,” *Studies in Eighteenth-Century Culture* 11 (1982): 279-97; Claire Dalton, “An Essay in the Deconstruction of Contract Doctrine,” *Yale Law Journal* 94 (1985): 997-1221; Edward Berenson, *The Trial of Madame Caillaux* (Berkeley and Los Angeles: Univ. of California Press, 1992). The work of most other “law and story” critics, though often extremely useful, tends to treat the category of “story” as if it were a unitary genre, essentialist and transhistorical. A recent *Michigan Law Review* symposium on legal storytelling held in August 1989 is typical. It contains useful articles on such topics as the humanizing impact of stories about the oppression, victimization, and brutalization of “outgroups” (Delgado); the “competing versions of a story” that become “an important feature of the dispute at hand” (Scheppelle); and the stories that lawyers “translate” into meaningful forensic shape for their clients (Cunningham). Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative,” *Michigan Law Review* 87 (1989): 2411-41; Kim Lane Scheppelle, “Foreword: Telling Stories,” *Michigan Law Review* 87 (1989): 2073-98; Clark D. Cunningham, “A Tale of Two Clients: Thinking About Law as Language,” *Michigan Law Review* 87 (1989): 2459-94. Yet none of these investigations take into account the enormous wealth of familiar—and significantly diverging—story-forms that must inform any lawyer’s or jury’s “narrativization” of the evidence at trial.

37. The best introductions to American literary sentimentality are Jane Tompkins, *Sensational Designs: The Cultural Work of American Fiction, 1790-1860* (New York: Oxford Univ. Press, 1985); Shirley Samuels, ed., *The Culture of Sentiment: Race, Gender and Sentimentality in Nineteenth-Century America* (Oxford: Oxford Univ. Press, 1992); Philip Fisher, “Making a Thing Into a Man: The Sentimental Novel and Slavery,” in *Hard Facts: Setting and Form in the American Novel* (Oxford: Oxford Univ. Press, 1987). Fisher argues that in the case of “prisoners, children, animals and slaves—the weak and the helpless within society gain by means of sentimental experience full representation through the central moral category of compassion.”

masters, teachers, or relatives, the familiar “trials and tribulations” plot pattern ensured that in the final chapter virtue would be rewarded and vice punished.³⁸ By suggesting to the jury that the “story” of the Beecher-Tilton case could be read as a familiar sentimental narrative, lawyers invited juror-readers to assign the trial’s “characters” to clearly demarcated categories of virtue and vice, to conform complex and ambiguous fact constellations to paradigmatic plots of unjust treatment, and to view their own verdict as an “authorial” opportunity to mete out rewards and punishments, producing an appropriately happy ending. Such literary surrogacy becomes a shortcut through the painstaking and difficult process of evidentiary evaluation: having accepted a proffered story formulation, jurors know how to assess each piece of evidence and resolve each testimonial conflict. The *story* assumes a kind of primacy, determining rather than reflecting the answers to questions about what happened or which party has the better legal claim. Especially in a lengthy, confusing trial such as Beecher’s, the interpretive certainty of sentimental story logic can do more than simply guide evidentiary assessment: it can supplant it. This means that the party who supplies the most persuasive story formulation of the case’s facts has gone a long way towards winning the case. It is not surprising, therefore, that many of the bitterest courtroom conflicts are, at bottom, about which party will control the story framework through which the jury “reads” the case.³⁹ It is not necessary, of course, that opposing

Fisher, 94-95. On sentimentality’s resistance to “humanizing” its villains, see Fisher, 116-17.

38. In the gallery of classic sentimental victims, many ultimately succeed in worldly terms, winning marriage, money and, presumably, personal salvation. These include Ellen Montgomery in Susan Warner’s *The Wide Wide World* (New York: G. P. Putnam, 1851), Gertie in Maria Cummins’s *The Lamplighter* (Boston: J. P. Jewett and Co., 1854), and Ishmael Worth in Emma D.E.N. Southworth’s *Ishmael; or In the Depths* (Philadelphia: T. B. Peterson, 1876), as well as some who succeed by going to heaven, like Little Eva in Harriet Beecher Stowe’s *Uncle Tom’s Cabin, or Life Among the Lowly* (Boston: J.P. Jewett and Co., 1852). The unrelieved and unavenged sufferings of such characters as Dickens’s Jo (Charles Dickens, *Bleak House* (London: Chapman and Hall, 1853)) and Smike (Charles Dickens, *Life and Adventures of Nicholas Nickleby* (London: Chapman and Hall, 1839)), or Stowe’s Prue (*Uncle Tom’s Cabin*), which are not “solved” within the confines of the story, are consistent with the sentimental, reader-centered strategy since, if their pain is effective, it will elicit in readers a determination to relieve such suffering wherever they encounter it in the world.

39. In their recent analysis of the courtroom and media narrativization of the first Rodney King beating trial and the 1992 Los Angeles riots, Kimberlé Crenshaw and Gary Peller use this approach effectively, describing the battle for narrative control at the trial as a larger ideological struggle that would determine the meaning of race in the trial context. “This very struggle over meaning is precisely what the intense contestations about race in the law are really about,” they argue. Kimberlé Crenshaw and Gary Peller, “Reel Time/Real Justice,” in *Reading Rodney King/Reading Urban Uprising*, ed. Robert Gooding-Williams (New York: Routledge, 1993), 64. They identify a defense strategy of “disaggregation,” a “narrative technique that narrows the perception of the range of illegitimate racial power by divorcing particular episodes from their larger social contrast,” and compare it to a “counternarrative” of insurrection that “implies a focus on the power relations and dynamics that exist between the ‘rioters’ and the ‘police’,” conceiving of the uprising “as a communal response to a much larger set of issues of social

parties conveniently champion different literary modes; at the Beecher-Tilton trial both sides exploited sentimentality's emotional powers when it suited them to do so, and both sides mocked sentimentality when such mockery seemed expedient.⁴⁰

A brief example will illustrate how this process of sentimental narrativizing worked at the Beecher-Tilton trial. As plaintiff's counsel, Theodore Tilton's attorneys made their opening statement to the jury before the first witness was sworn, giving them a powerful opportunity to preempt the storymaking field by controlling each juror's initial assignment of the roles of hero and villain to one or the other of the parties.⁴¹ After a lengthy recitation of the wrongs to which Tilton had been subjected by Beecher, Samuel D. Morris ended the first day of his opening statement for Theodore Tilton by telling the jury: "We come here from a blighted and a desolated home. The children of my client are scattered in different parts. He will return to-night to as cold, as cheerless, and as desolate a home as there is in the land. And from that voiceless home and cheerless fireside he will come in the morning, to meet you, fathers, and brothers, and husbands, you coming from your happy homes, he from his desolate one."⁴² Even this fragment of Morris's rhetoric, which is consistent with his tone and vocabulary throughout the three days of his opening, reveals a great deal. First, it shows how Morris effectively exploits the familiar sentimental tropes of splintered family, cheerless fireside, and suffering father/brother/husband, in order to demonstrate that it is Tilton, not Beecher, who should occupy the space of sympathetic victim-hero in the jurors' minds. Morris wants to elicit from juror-readers the kind of pity and compassion for a deeply wronged (but deserving and compensable) hero that they had learned to feel by reading sentimental fiction and, as a practical matter, to plant that

power." *Ibid.*, 68.

40. In his closing for Beecher, for instance, Porter dealt with the highly sentimentalized language of a letter of Elizabeth Tilton's both affirmatively and defensively. First, he exploited sentimentality as a guarantor of sincerity and a tool for making determinations of credibility when he noted that the letter was written "by the side of the cradle and on the evening of the Sabbath day" by a "mother loyal to her husband" (III 576). Then, in an attempt to co-opt the sneering response such letters had elicited, he blamed their availability on Theodore Tilton, who betrayed his wife by "sending forth this letter to the world to encounter the scoffs and the derision of those who despise sentimentalism" (III 576). Earlier, he had invited the jurors to blame the letters' artificiality on Theodore Tilton: "You marvel at the sentimental form of the letters of Mrs. Tilton. Now bear in mind, gentlemen, she had an excuse, this man required it. It was he that dictated how her letters were to be written" (III 573). This doubleness of attitude, both accepting and mocking the emotional intensity of sentimental rhetoric, especially in letters, ran throughout the trial.

41. Beecher's counsel made a delayed opening statement beginning on the thirty-seventh day of the trial, after Tilton had presented his affirmative case.

42. I 33.

characterization firmly enough so that the coming months of testimony will be filtered through it.

Second, Morris sets up a narrative opposition which is not, as one might expect, between plaintiff and defendant, but between plaintiff and *juror*. By positioning the jurors as the possessors of successful, family-defined identities (fathers and brothers and husbands), and superior domestic comforts (your happy homes), Morris encourages them to look down on Tilton in pity for having undeservedly lost what they are imaged as enjoying: a happy home and family. At the same time, however, he also implies that no family happiness is proof against a home-wrecker like Beecher, whose "crimes" threaten everyone's security, including the jurors'. Morris drives the point home two days later by assuring the jury that when they have rendered the verdict that would "brand the seducer as his crime deserves to be branded," they would "receive the prayers and blessings of every virtuous mother and of every virtuous daughter in the land, and a peaceful conscience will follow you through life, will be with you in the last solemn scenes on earth, and console you when at last you stand with your life-record before the ever-living God."⁴³ As a reward for reestablishing justice and virtue in the world through their verdict, the jurors will earn, in their own lives, the gratitude of others, a guilt-free conscience, and an easy passage at the Last Judgment. Morris's rhetoric employs senti-mentality at its most powerful: not only does he use sentimental stereotypes to shape the jurors' reception of the upcoming evidence, but he also makes each juror's personal life a part of what is at stake in the trial. His forensic sentimentality constructs the reader as it constructs its own text.

II. THE FEAR OF FALSE FICTIONS: CONVERGENCES OF TRIAL STRUCTURE, CASE CONTENT, AND CULTURAL CONCERN

If the level of attention accorded the Beecher-Tilton scandal by the media and the American public gave it national importance, its crystallization into adversarial litigation transformed it, in the minds of many, into a matter of world-historical significance. "This is no contest between litigants to determine the right of property," asserted Morris to resounding applause as he began his opening statement for Theodore Tilton. "It is a trial the consequences of which reach to the very foundations of society. The home, the marriage relation with all that is dear in that relation, is upon trial in this case. Upon the result of your verdict to a very large extent, also, will depend the integrity

43. I 58.

of the Christian religion.”⁴⁴ To understand how millions of newspaper-reading “jurors” came to believe that their deepest personal, cultural, and religious values were somehow at stake in Judge Neilson’s Brooklyn courtroom, we need to find a connection between the structure of trial process, the substantive issues raised by this particular trial, and a pervasive concern of Americans at the time.⁴⁵ That connection is the problem of hypocrisy.

All litigation simultaneously generates and undermines every witness’s testimonial narrative. The problem of testimonial hypocrisy is thus built into the structural dynamic of every trial. While the witness’s job of testifying requires that he produce a coherent narrative version of relevant events as he knows them, it also insists structurally that every fact-based assertion he makes be viewed with suspicion. Whether the attacks are mounted in cross-examination or by the conflicting testimony of other witnesses, or whether jurors merely learn from the adversarial pressure of trial process that no witness account should be accepted unquestioningly, trial process treats any factual assertion as a possible lie. The dialectical alternation that characterizes procedures such as cross-examination,

44. I 19-20. Not to be outdone, defense counsel assured the jury in their opening that “the magnitude and importance of the questions here involved cannot be over-estimated, for they go down to the very foundations of our social, moral and religious life,” and concluded by assuring the jury that the trial “will loom larger in history than any which has taken place for eighteen centuries” (II 6, 92). Jurors were warned that they would have to answer for their verdict at the Last Judgment, and that “strangers from distant climes” would one day make pilgrimages to the courtroom to see the place “from which was given back to the world freed from cloud or passing shadow, the name of Henry Ward Beecher” (II 1, 92). Though the parties themselves treated the matter as a grudge match between public men over personal betrayal, the attorneys never tired of asserting that all of civilization hung fire on the success of their efforts. Much of this rhetorical grandstanding was obviously aimed at the almost one hundred reporters who attended court daily, writing up each day’s “high points” and turning well-known lawyers into nationally lionized heroes. Nonetheless, it is a revealing indication of the extraordinary notion participants had at the time of the case’s then-current and imagined historical significance.

45. In using such apocalyptic rhetoric, Morris was obviously delivering a speech to the nation as well as to the jurors and courtroom spectators who heard his voice in person. Even *The New York Times* covered each day’s testimony in detail. Media coverage of the case assumed not only that readers were intensely involved, but that they too were sitting in judgment. The previous summer, as the church investigation generated national headlines, Godkin declared in *The Nation* that the case had been “transferred to a different forum” by the attention of national media:

This forum consists of the newspapers and their readers, and a more unsatisfactory one, in some respects, there could hardly be, but it is the one before which a man in Mr. Beecher’s position must plead, sooner or later, to any charge against him. . . . There is not a house in the country in which the defendant is not, week after week, put on his trial, and in every one of them on a different indictment and with different testimony; and the result he never wholly knows, as the verdict is never wholly formulated and uttered.

E. L. Godkin, “The Trial by Newspaper,” *The Nation*, 30 July 1874, 70. In its posttrial assessment, *Harper’s Weekly*, like many other papers, adopted the same “nation of jurors” metaphor when it declared: “The real result is not to be found in the formal verdict of the jury, but in the general impression, for as the evidence in no cause was more universally read, so the verdict in every man’s breast was never more entirely independent of that of the court-room.” 17 July 1875, 574, cited in Carter, 121.

rebuttal, and final argument dramatically enacts the resistance of trial process to any party's claim to have a monopoly on truth. Among recent trial analyses, those of James Boyd White have consistently celebrated adversarialness for establishing "a culture of argument" in which "the conversation that it creates is at once its method and its point, and its object is to give to the world it creates the kind of intelligibility that results from the simultaneous recognition of contrasting positions."⁴⁶ White's analysis reads the "performed equality" of trial process as an affirmation of the possibility of multiplicity. What he ignores is the absolute commitment of that process to continuous, profound attacks on each position considered separately. Each party is given a participatory venue in which to speak, but no speaking is achieved except under siege. Where attacks on assertions of fact are missing, because there are no fundamental factual conflicts, the case will be decided on a motion for summary judgment, obviating the need for trial.⁴⁷ The survival of a case to trial means that jurors must negotiate a battlefield of testimony and argument in which, at the same time that all narrators claim to be truth-speakers, all are, to a greater or lesser degree, attacked as hypocritical "fictionalizers." In rendering a verdict for one party, the fact finder delegitimizes at least part of the other party's version (and perhaps parts of all versions) as constructed falsehood.

If every trial thus enacts a contest between conflicting but purportedly truthful narratives, the Beecher-Tilton trial was a performance of mind-numbing length that had a single subject: credibility. Importantly, the case turned not just on credibility in general but on one component of credibility: testimonial honesty. Consider for a moment other kinds of legal claims and offers of proof. In bank fraud or antitrust cases, the facts may be only minimally in dispute. Such cases are established primarily through reams of corporate or financial documents and records, and the large majority of witnesses may simply identify and interpret documents. The validity or implications of such interpretations may then be challenged by the

46. James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: Univ. of Chicago Press, 1984), 267.

47. Under modern rules of civil procedure, either party can obtain summary judgment if "there is no genuine issue . . . as to any material fact" and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). For a history of the gradual adoption of summary judgment procedures, see Charles E. Clark and Charles U. Samenow, "The Summary Judgment," *Yale Law Journal* 38 (1929): 444-56. The intense factual disputes that characterized the Beecher case would have precluded summary judgment, of course, even if it had been available in New York in 1875. To say that there are no conflicts "as to any material fact" does not mean, however, that there is nothing to argue about. Where both parties stipulate to a set of facts, they may nevertheless engage in intense and protracted disputes about how those facts are to be interpreted, about applicable law, and about how the law is to be applied to the facts of the case.

opposing party without the question of the witness's testimonial credibility arising. Typically, the outcome in such cases most often depends on the establishment of such complex law-fact hybrids as the existence of an unfair restraint of trade, whose proof may depend substantially on statistical evidence and statutory interpretation. Even in criminal cases that turn on eyewitness identification, testimonial honesty may be virtually irrelevant. Where a witness claims to have seen the defendant commit the crime, the witness's *perceptual* credibility—her ability to see, or hear, or remember the details of the event under the particular circumstances—may be very much at issue, while her *sincerity*, her honest belief in what she is saying, may remain unquestioned. Her identification of the defendant as the person who robbed her may be attacked on the ground that it was too dark to see clearly or that the incident occurred so long ago that her memory of it must have faded, but, with rare exceptions, such challenges do not amount to a suggestion that the witness is intentionally constructing a false fiction.⁴⁸ Similarly, where a criminal defendant such as John Hinckley raises a defense of insanity, both sides may agree on or even stipulate to the “facts of the case.” The verdict then turns on the jury's assessment of the opposing conclusions of expert psychiatric witnesses on the single issue of the defendant's mental capacity. Although experts may bitterly disagree, and although their criteria, methods, and deductions may be challenged, it is rare indeed for such a witness to be accused of lying or testifying insincerely.⁴⁹

48. This argument does not mean to ignore the often profoundly blurred line between misperception and bias. The unreliability of eyewitness testimony is notorious, and has been for more than a century. See *United States v. Wade*, 388 U.S. 218, 228-43 (1967). The “suggestibility” that troubled the Supreme Court in suspect lineup situations applies to other areas as well. It includes not only witness unreliability, but juror difficulty in assessing the credibility of eyewitness testimony. Many studies have shown that a witness's sincere recollection can be significantly affected by the “unconscious transference” of memories that pre-existed the event and by post-event suggestions. See Gary L. Wells and Elizabeth Loftus, eds., *Eyewitness Testimony: Psychological Perspectives* (Cambridge: Cambridge Univ. Press, 1984), 1-11; Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: Norton, 1985), 162. These unreliabilities have led to the adoption of various safeguards, including expert testimony intended to sensitize the jury to factors that affect memory and perception. For discussion of this trend, see Elaine D. Ingulli, “Trial by Jury: Reflections on Witness Credibility, Expert Testimony and Recantation,” *Valparaiso Law Review* 20 (1986): 145-85; “Symposium: The Ethics of Expert Testimony,” *Law and Human Behavior* 10 (1986). Nevertheless, it is still possible to distinguish between the inherent unreliability of individual perception and the construction of intentionally false testimony.

49. The line between “sincerity” and bias can be a fine one. Without intentionally falsifying their characterizations of data or their conclusions, expert witnesses are often influenced by their own ideological, political, and personal agendas. On this topic, see Barton L. Ingraham, “The Ethics of Testimony: Conflicting Views on the Role of the Criminologist as Expert Witness,” in *Expert Witnesses: Criminologists in the Courtroom*, ed. Patrick Anderson and L. Thomas Winfree (New York: SUNY Press, 1987), 178-99; and “Symposium: The Ethics of Expert Testimony,” *Law and Human Behavior* 10 (1986). As Gordon Bermant has noted, experts “do not knowingly speak falsely,” but debates about the propriety of expert testimony may “camouflage arguments about the strength of psychological knowledge” and the scientific certainty of such

In the Beecher case, however, it was clear from the outset that if one party's witnesses were telling the truth, then his opponent's witnesses *must* be lying, at least about the central disputed facts. "Does not our view exclude his view?" demanded William Maxwell Evarts in his closing argument for Beecher. "Does not our view convict him of wilful, purposed contrivance of evidence against the truth to beguile your judgment and mislead your verdict?"⁵⁰ It is important to remember that even the most flagrantly hypocritical witnesses tell the truth most of the time, because the bulk of their testimony is about secondary matters, background details, and undisputed events. In the Beecher-Tilton case, both parties agreed that Elizabeth Tilton and Henry Ward Beecher had a longstanding, intimate relationship; they disagreed only about whether that relationship had included consummated sexual intimacy. Unsurprisingly, there were no eyewitnesses to the alleged adultery. Instead, 111 circumstantial witnesses recounted and disputed the existence and significance of various conversations, documents, and tangential events.⁵¹ The area of disagreement was thus small but crucial, and it turned as much on matters of interpretation, on what certain epistolary or conversational phrases *meant*, as on the actual occurrence or non-occurrence of events. Beecher and Tilton each testified, and each supplied meanings for contested documents. Ultimately, the jury's task was to decide whether such testimonial declarations were credible truth or self-serving hypocrisy.

Theodore Tilton testified that in July 1870 his wife tearfully confessed to him that she had had an affair with Beecher for over a year.⁵² Beecher had gradually overcome her resistance, Tilton tes-

expert testimony. Gordon Bermant, "Two Conjectures about the Issue of Expert Testimony," *Law and Human Behavior* 10 (1986): 97-100.

50. III 691.

51. For a provocative discussion of the increasing use of circumstantial evidence in the nineteenth century, and its relation to the rise of the realist novel, see Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins Univ. Press, 1992).

52. I 396. One crux of the trial's credibility problems was that Elizabeth Tilton's continual out-of-court assertions and denials of guilt led to "such a bewildering series of recantations that in the end nothing she said was fully believed." Rugoff, *America's Gilded Age*, 204. Because Mrs. Tilton could not testify, her role in the relationship had to be constructed indirectly, through letters and conversations; such texts were not merely ambiguous, they were directly inconsistent. Within one twenty-four hour period, she wrote a "confession" of adultery which her husband showed to Beecher, a "revocation" of those accusations when Beecher visited her where she lay in bed recovering from a miscarriage, and a retraction of the revocation when her husband came home and found out about the letter she had given to Beecher. Waller, 125-26; Shaplen, 86-98. On the seventy-seventh day of the trial, she attempted to read a statement declaring her innocence, but was peremptorily silenced by the trial judge (III 323, 325). Three years after the trial, she published a letter unequivocally admitting the affair. Shaplen, 266; Waller, 145. Learning of her statement when he was traveling in Germany, Mark Twain wrote wearily to William Dean Howells: "[W]hen they tell me that Mrs. Tilton has confessed & Mr. B. denied, I say that both of them have done that before. therefore let the worn stub of the

tified, by convincing her that where two people loved each other, sexual union was wholly pure and not a violation of her marriage vow.⁵³ Tilton's friend Frank Moulton and Moulton's very respectable wife Emma both testified to numerous conversations with Beecher in which the adultery was explicitly discussed and regretted, and in which Beecher sought help in hiding it from his congregation, his family, and the public.⁵⁴ Letters by Beecher were introduced in which he seemed to confess to having committed a great wrong against the Tiltons, asking Theodore Tilton's forgiveness and declaring "I humble myself before him as I do before my God."⁵⁵ Yet because the letters never explicitly mentioned adultery and employed an ambiguous and emotional vocabulary throughout, their meaning became a matter of intense dispute. Though Beecher's memory consistently failed him on the stand, causing him to answer "I don't know" or "I don't remember" to hundreds of questions, he did testify clearly that no adultery had ever occurred and that he had never made improper proposals to Elizabeth Tilton.⁵⁶ Beecher testified that Tilton told him of Elizabeth's "inordinate affection for [him], or her exceeding affection."⁵⁷ To the jury, Beecher's attorneys argued that she had conceived so intense a passion for him that she may have believed it returned.⁵⁸ The only wrongs he admitted against the Tiltons were having unfortunately been the means of Theodore's losing the editorship of *The Independent* and having counseled Elizabeth to separate from a spouse who was mistreating her.⁵⁹ Beecher's testimony cast Tilton as an adulterous and abusive husband whose selfish egotism had led to an intense jealousy of the older and more prominent Beecher and a determination to destroy him. Beecher was followed on the witness stand by a long parade of witnesses to his good public character, service, and reputation.⁶⁰ This condensation of the case into a testimonial credibility contest ultimately paralyzed the jury. Their foreman attributed the deadlock to a "question of the veracity of witnesses." In dismissing the jury,

Plymouth white-wash brush be brought out once more, & let the faithful spit on their hands and get to work regardless of me" Mark Twain to William Dean Howells, 4 May 1878, *Selected Mark Twain-Howells Letters 1872-1910*, ed. Frederick Anderson, William Gibson, and Henry Nash Smith (Cambridge: Belknap Press of Harvard Univ. Press, 1967), 109.

53. I 396-97.

54. See I 62-65, 75-89, 104, 129-30 for the testimony of Frank Moulton, and I 719-54 for that of Emma Moulton.

55. I 401, II 778-80, 793-94.

56. II 758, 765. See generally II 729 to III 136.

57. II 761.

58. II 48-49; III 661-62, 746, 808.

59. II 770-72.

60. II 137 to III 556.

the judge described their sole problem as “the weight of testimony and the credibility of certain witnesses.”⁶¹

Significantly, the trial’s central credibility questions were presented to the jury as a series of problems in textual interpretation, whether the texts at issue were the hundreds of ambiguous or vague letters and documents whose disputed meaning became central to the case, or the conflicting narrative versions of past events offered by opposing witnesses. Indeed, the fundamental ambiguity of language became an explicit and central issue at trial. As Beecher’s attorneys declared in their opening statement to the jury: “Everything here turns upon a single question. When these people were talking about generalities, when Mr. Beecher was using general language that might cover one thing or cover another thing . . . to what were the parties referring, what did they have in their minds?”⁶² Confronted with a plethora of ambiguous and conflicting narratives, jurors had to decide what criteria to use in getting from text to inference, from oral or written declaration to the “mind’s” truth. Mere textual persuasiveness, like mere character reputation, was increasingly shown to be insufficient. The iterated onslaught of cross-examination, collateral challenge, and lawyerly deconstruction in a case that turned on charges not just of sexual misbehavior, but of hypocritical proclamations of virtue, encouraged juror-readers to lose confidence in their ability to make reliable inferences from the circumstantial evidence of everyday life. The vexed question of Beecher’s honesty triggered an unsettling uncertainty that seemed to infect every assertion of truth or virtue in every context.

What the Beecher-Tilton trial did, to the obsessive discomfort of both jurors and American newspaper readers, was to demonstrate that the dynamic narrativizing moment which is at the heart of all text-producing activities, from letter writing to explanatory testifying to the construction of a public persona, is also the precise moment at which the possibility of falsification and deception enters. The authorial control necessary to the purposeful transformation of subjective experience into coherent, communicable testimony can, and in some senses, must, operate in the service of considerations other than truth. Clarity, performance, and eloquence always create textual surfaces haunted by the shadow of misleading hypocrisy. Most distressingly, from the vantage point of the juror-reader, it is clear that the more persuasive the textual performance, the more difficult it is to distinguish falsity from truth, because a textual surface can remain

61. III 1041-42.

62. II 87.

consistent and believable even if its connection to the referential world outside the text has intentionally been severed.⁶³

The Beecher-Tilton trial thus presented a series of related questions, all of which raise the problem of what we might call “false fictions,” plausible but essentially and intentionally false narratives. How can we distinguish a sincere witness from one who “performs” sincerity but is actually lying? How can we ever *know* what actually happened between two people in private so that we can distinguish between truthful testimony and equally “realistic” invention? How can we tell, in our own lives, whether someone we look up to as a teacher, preacher, or intimate companion is “really” good and deserving of respect, or a privately corrupt hypocrite and therefore a “false prophet” or “sinful spouse”? False fictions may take the form of a dissembling witness’s misleading appearance and behavior, a believable but deceptive testimony, or the aggressively virtuous public persona of a privately dissolute man. If the problem of identifying false fictions was indisputably at the heart of the Beecher-Tilton jury’s task, a deep anxiety about the general difficulty of doing so was already troubling many Americans long before the Beecher scandal acted that anxiety out on the forensic stage.

As Karen Halttunen has convincingly argued in *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830-1870*, “the heart of the sentimental value system was a deep fear of the hypocrisy that was believed to be poisoning American social relations.”⁶⁴ The socially successful hypocrite—the con man—became America’s supreme criminal because he could “sever the connection between inner character and outward appearances by consciously manipulating the impression he made on others.”⁶⁵ The new urbanites, accustomed to a world in which they had shared a lifetime of experiences or at least a common social, geographic, and

63. Riffaterre argues that the believability, or “truthfulness,” of a literary fiction is a textual effect rather than a function of the relation between text and external world. Michael Riffaterre, *Fictional Truth* (Baltimore: Johns Hopkins Univ. Press, 1990). This argument seems to me equally persuasive when applied to courtroom narratives, where the “external world,” though very much at issue, can only be represented through the narratives of testimony, or, on occasion, the “speaking” narratives of “real” evidence.

64. Karen Halttunen, *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830-1870* (New Haven: Yale Univ. Press, 1982), xvii. As David S. Reynolds notes approvingly in describing Halttunen’s thesis, her work “shows that middle-class Americans, threatened by the moral rootlessness and rampant theatricality of a society undergoing rapid urbanization, concocted various social rituals that were meant to shore up self-worth and promote social cohesiveness.” Her argument is especially useful, he concludes, in that “it manages to place seemingly contradictory elements of antebellum American culture—sincerity and showmanship, trust and mistrust—in a vibrant dialectical center.” David S. Reynolds, review of *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830-1870*, by Karen Halttunen, *American Historical Review* 94 (1989): 1477-78.

65. Halttunen, 42.

economic background with almost everyone they met, now had no reliable way to distinguish an offer of newfound friendship from the opening move in an elaborate con game.⁶⁶ The placelessness induced by a rapidly changing society made hypocrisy “not merely a personal sin; it was a social offense that threatened to dissolve the ties of mutual confidence binding men together.”⁶⁷ Over time, the newcomer’s dilemma was answered by what Halttunen calls “the sentimental typology of conduct,” preached by a wide-ranging series of “advisers” who encouraged a “cult of sincerity” which asserted first that “all aspects of manner and appearance were visible outward signs

66. This problem is represented vividly in Horatio Alger’s novels, which were meant to serve as entertaining advice manuals for their readers. In *Struggling Upward; or Luke Larkin’s Luck* (1890), the hero, Luke, is befriended on the train to Chicago by a pleasant and well-dressed young man, who proposes that they stay together at a hotel. *Struggling Upward; or Luke Larkin’s Luck* (1890; New York: Penguin Books, 1985). Luke is delighted to have a knowledgeable and generous companion, but Alger quickly makes clear that the other’s “object was to gain Luke’s entire confidence, and remove any suspicion he might possibly entertain” in order to swindle him of his money. *Ibid.*, 232. Luke’s luck holds, and he is able to reveal the man as a liar. *Ibid.*, 240-42.

In *Ragged Dick* (1868), the poor bootblack Dick, newly dressed in fine clothes, shows an out-of-towner around New York. Horatio Alger, Jr., *Ragged Dick and Struggling Upward* (1868; New York: Penguin Books, 1985). Within the space of a few pages, they encounter an “agent of the Excelsior Copper Mining Company” who promises them a fortune in three years if they will invest in his stock (26-27), and are targeted by a con man, who claims to have found a wallet stuffed with money, which he offers to give them for twenty dollars (33-37). When Dick’s well-dressed companion is accused of having stolen a pocketbook, the accuser insists that “you can’t tell by looks. . . . They’re deceitful; villains are generally well dressed” (44). In each incident, Dick, the experienced urbanite, recognizes the swindle and avoids it. Shortly thereafter, they meet a newly arrived “countryman” who has just been swindled of fifty dollars by a plausible con artist (50). As the “miserable youth” bewails his bad luck, Dick has little pity for his ignorance: “He’s a baby,” says Dick, contemptuously. “He’d ought to know how to take care of himself and his money. A feller has to look sharp in this city, or he’ll lose his eye-teeth before he knows it” (51).

67. Halttunen, 34. On the impact of immigration to urban areas on Americans’ general sense of security and “place,” see Wiebe, who argues in *The Search for Order* that the rush to the cities “brought a constant influx of inexperienced newcomers” whose “sense of belonging” was disrupted and who shared little more than a “common sense of drift. . . . Fearful of each other’s competition and ignorant of each other’s ways, they lived in mutual suspicion, as separated into groups of their own kind as they could manage.” Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967), 12-14. While “the full range of impersonal activities” like bribery, extortion, and the yellow press characterized business,

others preached a segmented morality that divided a man’s life into compartments and judged each part by a separate standard. A gracious warmth in the living room, decent manners in the street, pious thoughts on Sunday, a formal honesty in dealing with acquaintances, and animal cunning before the rest of the world, all passed the bar of justice.

Ibid., 39-40.

On the connection of these new urban immigrants to Beecher and to Plymouth Church, see Waller, 66-68, who describes Beecher’s congregation as made up of young men who had come to the cities from rural farms and villages where they were “closely tied” to their families and backgrounds “in a geographic, an economic, and a psychological sense” (68). “How different was Brooklyn,” she continues, “where there were no familiar faces and no inheritance to assure a secure future. These young men, like Henry Ward Beecher himself, were on their own in the marketplace” (69). In Beecher’s sermons and the social life surrounding the church, these new New Yorkers found “an explanation and justification for the changes in their lives and attitudes” (69).

of inner moral qualities” and, consequently, that the aspiring antebellum newcomer could move confidently through a new society by following a set of behavioral prescriptions.⁶⁸ Properly attended to, the rules would enable him to establish his own social acceptability and to gauge the sincerity of others. One of the most popular of these advice books was Henry Ward Beecher’s *Seven Lectures to Young Men*, first published in 1843.⁶⁹ These lectures warned of the “moral deterioration of youth, especially in the new western cities” and the dangers of gambling, drinking, and urban brothels, while preaching a gospel of success, in which hard work, attention to one’s appearance and behavior, and inner virtue would bring worldly success.⁷⁰ Discussing *Seven Lectures*, Altina Waller notes: “As the stable communities of early America were breaking down and forcing young men to migrate either West or to the cities, many found this a dangerous journey—both physically and emotionally—and moral guidebooks became standard reading.”⁷¹

Halttunen focuses on antebellum America, a period when the first generation of young people left their familiar rural worlds for uncertain opportunities in the cities. Yet the anxiety she identifies was still very much alive in the 1870s.⁷² Indeed one of the lessons of the public hysteria surrounding the Beecher-Tilton trial is that anxiety about hypocrisy remained intense—or perhaps reemerged—as the effectiveness of such antebellum solutions as the cult of sincerity

68. Halttunen, 40-55. Halttunen’s work draws on a broad range of popular advice manuals, written by clergymen, teachers, and sentimental writers, including William A. Alcott, *Young Man’s Guide* (Boston: Lilly, Wait, Colman, and Holden, 1834); Reverend David Magie, *The Springtime of Life; or, Advice to Youth* (New York: Robert Carter and Bros., 1853); Reverend Rufus W. Clark, *Lectures on the Formation of Character, Temptations and Missions of Young Men* (Boston: John P. Jewett and Co., 1853). See also Waller’s extensive bibliography of advice books. Waller, 248-55.

69. Henry Ward Beecher, *Seven Lectures to Young Men, on Various Important Subjects; Delivered Before the Young Men of Indianapolis, Indiana, During the Winter of 1843-4* (Indianapolis: Thomas B. Cutler, 1844).

70. Clark, 57; Waller, 25.

71. Waller, 25.

72. Indeed, Halttunen’s somewhat oversimplified “rise and fall” trajectory is the one aspect of her thesis that has been critiqued. Both David Grimsted and William R. Leach have noted that the fears of hypocrisy, and the prescriptive solutions offered to assuage them, both predated and lasted beyond the years Halttunen assigns. As Leach asks: “If middle-class anxieties were as intense and troubling as Halttunen claims, how could they have disappeared so quickly? It seems to me that the tensions between authenticity and charlatanism, the need for individual expression and the need to make concessions to class and status, were never resolved; they have continued to mark bourgeois behavior in our own time.” William R. Leach, review of *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830-1870*, by Karen Halttunen, *New England Quarterly* 56 (1983): 599-603; Grimstead, 665-66. The rhetoric surrounding Justice Clarence Thomas’s confirmation hearings is an obvious modern case in point. Much of the defensive analysis insisted, as did Beecher’s defenders in the 1870s, that the judge’s life of public virtue, his prescriptive obedience to the requirements of public rectitude, constituted strong evidence that he could not possibly have been a hypocrite hiding a corrupt private life.

eroded.⁷³ By 1875, outward appearance, which might once have been believed to hold the key to inner character, was no longer accepted as a universally reliable index.⁷⁴ The possibility of Beecher's adultery was thus troubling as much for its inconsistency with his decades-long eminence as for its obvious immorality. If publicly available evidence of virtue was of no use whatever in assessing the likelihood of private misbehavior, then one was left with a dizzying sense of the fallibility of *all* knowledge and relationships, especially those one held most dear and upon which one's own identity most strongly depended.

Halttunen argues that the threat posed by successful hypocrisy is that it will "dissolve the ties of mutual confidence binding men together," because people will be unable to rely on the apparent virtue and sincerity of others. William Mowdesley Best articulated the same sense of a profound connection between sincerity, confidence, and the functioning of society in the legal context in his influential 1875 treatise, *The Principles of the Law of Evidence*. Like the writers of advice books who premised successful social interaction on an underlying trust in each other's sincerity, Best argued that the testimonial machinery of trial process was predicated on an assumption of the importance to society of a well-grounded belief in the honesty of others. Best introduces the subjects of proof and testimony by observing: "Mutual confidence between man and man being indispensable to the acquisition of knowledge, the happiness of

73. Because sentimentality no longer successfully assuaged anxieties about the difficulty of "reading" the true characters of others, the national "unmasking" of a much beloved and publicly righteous man like Beecher brought home the extreme difficulty of making reliable judgments. Support for this theory lies in the trial transcript itself. There, the continual harping by Beecher's lawyers on the necessary connection between character and conduct, their endless insistence on the absolute reliability of publicly virtuous behavior, begin to sound like a worried form of overkill, necessary precisely because the connection at issue could no longer be unproblematically presumed.

74. See Halttunen, 186-90. In a series of editorials E. L. Godkin wrote on the case in *The Nation*, he frequently mocked sentimentality (see, e.g., 3 September 1874); he also insisted that self-presentation and public "character" were simply not enough to constitute a reliable index of private virtue. In an August 1874 editorial, for instance, he asked,

Ought we not to take each person's account of his moral condition, and not look too nicely into the conduct of his life? We do not think we exaggerate when we say that Mr. Beecher has tried this system fully and faithfully in Brooklyn, and we do not fear to add that the events of the last three months were not necessary to satisfy people of its failure. It makes a state of society in which the self-respect of the honest, the manly, and pure-minded is lowered or destroyed, and in which that of the foul, the unscrupulous, the shallow and tricky, is raised and strengthened; and in which the good and bad and indifferent, by 'pooling' their character, as the railroad men say, produce a mass of corruption, indecency and vulgarity which has to be periodically washed away by some such tempest as we are now witnessing.

E. L. Godkin, *The Nation*, 20 August 1874, 120. When the "pure-minded" and the "tricky" can both present a seemingly acceptable "character," moral distinctions can no longer be reliably made, causing a "mass of corruption" that can only be cleansed by the harsh, overwhelming scrutiny of a major scandal.

our race, and indeed to the very existence of society, the great Creator has planted the springs of truth very deep in the human breast." The natural impulses to speak and to believe the truth are sanctioned by both morality and religion, Best declared, for "were we to lose either our feeling of obligation to tell the truth, or our disposition to receive as truth whatever is told to us, there would at once be an end to all science and all knowledge, beyond that which every man had obtained by his own personal observation and experience. . . . Language would be useless, and we should be but little removed from the brutes."⁷⁵

Best's analysis forges crucial links between the honesty of speakers, the trust of hearers, and the ongoing enterprise of civilization. Like Halttunen, he sees "mutual confidence" as the precondition for all positive social interaction, and therefore for all the culture-building enterprises of a society—government, science, discourse—that require communication. In Best's scheme, trials reaffirm a culture's belief in its own system of morality and truth by publicly identifying and condemning those who violate the culture-constituting "natural instinct" toward truth. After two years of destabilizing scandal about Beecher, the nation looked to the trial, with its official rituals of examination and deliberation, for just such a ritual of reassurance.⁷⁶ What the nation got can only be deemed a spectacular failure. The jury's refusal to provide a verdict one way or another stalled the process at what was intended to be only the midpoint of the drama, the weary moment when all assertions of truth had been thoroughly undercut by months of adversarial challenge. Had the trial "worked" as it was ideally supposed to, it would have climaxed at the moment of verdict, when a choice was made between warring versions of events. Either Beecher or Tilton would have been triumphantly unmasked as a lying "fictionalizer," and the jury's verdict would have

75. Best, 17-18.

76. In a September editorial in *The Nation*, E. L. Godkin declared that "people do not know what to believe" and were looking to the trial to settle the vexing questions of the scandal. Presciently, Godkin predicted that the trial would present "questions of veracity, between three or four persons whose credit is already greatly shaken, or, in other words, the very kind of questions on which juries are most likely to disagree" E. L. Godkin, *The Nation*, 24 September 1874, 201. Charles F. Marshall, a pro-Beecher editor who published one of the many books rushed to press in the interval between the filing of the complaint and the trial's commencement, declared:

The community is now directly interested in the issue now joined. If these men tell the truth, then Mr. Beecher should not be allowed to pollute the Christian religion by his ministrations. If they lie, it would be a general disgrace to permit them to escape punishment after having for so many months filled the public mind with such poisonous defilement. . . . Ten thousand immoral and obscene novels could not have done the harm which this case has done, in teaching the science of wrong to thousands of quick-witted and curious boys and girls.

Marshall, 609.

retroactively labelled one set of narratives “truth” and the other “fiction.”⁷⁷ However problematic and unsettling such a jury verdict might have been to many Americans, it would have provided a significant moment of formal closure. In the absence of any such authoritative resolution, however, the very blurriness of the line between fact and fiction became the only *official* verdict. The assessments of all private individuals were equal, and equally indeterminate. If the nation went into the Beecher trial troubled by its inability to discriminate sincerity from hypocrisy, it came out with less certainty than ever.

The dialectic of suspicion that I have described as characterizing trial process makes the courtroom an ideal setting for an anxiety about the problem of believable hypocrisy to be climactically enacted. Worried about being “tricked” by publicly virtuous men like Beecher, while at the same time unable to find reassurance in the prescriptive sincerity of sentimentality, Americans may have seen the law’s relentless adversariality as an official, authoritative version of their own questionings and concerns. Moreover, while armchair “jurors” might have found their anxieties mirrored in the process of any trial, this trial was, as I have explained, uniquely *about* hypocrisy. The nation’s “choice” of the Beecher-Tilton case as a national obsession becomes, in this light, quite comprehensible. This is not to say that this case was the only scandal, or the only trial, to focus Americans’ misgivings about the reliability of their neighbors’ seemingly moral outward behavior; this was an era of scandals, of which Beecher’s was only the most nationally publicized.⁷⁸ Fascination with the sexual

77. The jury need not agree that the winning side’s narrative version is unqualifiedly “true,” or that the losing party’s is “false,” nor need they agree with each other about what exactly happened to give rise to the lawsuit. Jurors may formulate inconsistent factual narratives, they may reject the insistent binarism of adversariality by formulating a third factual narrative drawn on facts put forth by both parties, or they may discount large chunks of either side’s version, yet still concur as to which side has the better case overall. Many juries attempt to “split the difference” by such strategies as awarding the plaintiff the verdict but extremely minimal damages, or, in criminal cases, by returning a verdict for a lesser included offense. By referring to the verdict as “triumphantly” labeling narratives truth or fiction, I mean to describe their formal effect. Ordinarily, jury verdicts are not accompanied by detailed findings of fact, and each juror’s personal “narrative” does not become part of the record. Yet, once the verdict is returned, it retroactively affects the “truth-value” of all witness and party narratives in any subsequent discussion of the case, whether in or out of court. The winner’s story is no longer described as “alleged,” but as proven, while the loser’s story must fight the ineradicable shadow of rejection.

78. As a decade, the 1870s seemed to major in scandal, especially in New York. In 1873, “Boss” Tweed was convicted in New York of corruption in public office after a sensational trial. A few years, earlier, the McFarland-Richardson affair of 1869 combined sex, divorce, and murder to spectacular effect. When actress Abby McFarland left her alcoholic husband and obtained an Indiana divorce, her now-former husband shot her lover, Richardson, in the offices of the *New York Tribune*. Before Richardson died, Henry Ward Beecher married him to Abby McFarland, and the resulting scandal was of national scope. The *New York Times* publicly doubted “whether a more disgraceful outrage on public morals has ever been committed in this

misbehavior of famously moral public personages was also hardly unique to the 1870s; our own recent history has seen a wave of similar scandal-trials, with the Clarence Thomas-Anita Hill hearings providing perhaps the most obvious parallel.

In pointing to a shared concern with hypocrisy as the link between the structure, substance, and social context of the Beecher-Tilton trial, my goal is not just to help explain its extraordinary notoriety, but to set the stage for an analysis of the strategic use of sentimentality—and antisentimentality—in the courtroom. Because the “sentimental synthesis” was originally designed to assuage anxieties about pervasive hypocrisy, its rhetorical dominance at the Beecher-Tilton trial comes as no surprise. Yet such a solution could no longer, by the 1870s, be proffered unproblematically. At the same time that William Maxwell Evarts was attempting to “solve” the Beecher-Tilton trial’s credibility problem through the strategies of sentimentality, Theodore Tilton’s attorneys were trying, somewhat inconsistently, to challenge sentimentality’s assumptions, and, in the world of literary discourse, Mark Twain and Charles Dudley Warner were attacking the forensic use of sentimentality with passionate virulence.

III. THE JUROR AS SENTIMENTAL READER: “WHY DO YOU LOOK AT THE GROWING BEAUTY OF THEIR FACE AND FORM, AND FEEL SAFE?”

If the structure and substance of the Beecher-Tilton trial were thus uniquely constituted to play into a well-established cultural anxiety about the difficulty of distinguishing glib confidence men from authentic moral paragons, the litigative strategy of the parties reflects a clear attempt to intensify and to exploit that anxiety to their own advantages. We have already seen Halttunen’s and Best’s remarkably similar assertions that what is at stake in a test of hypocrisy is the “mutual confidence” that underlies the continuing viability of the participants’ community.

I now want to look at a series of statements made by William Maxwell Evarts in his eight-day closing argument for Beecher. Evarts, America’s leading trial lawyer, had been Andrew Johnson’s

community than is involved in the open scorn of the marriage tie and the total disregard of all principles of justice, which professed ministers of religion and public writers have managed to display.” Editorial, *New York Times*, 4 December 1869, quoted in Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* (New York: Macmillan, 1962). That Beecher had already been connected in the public mind with sexual scandal may have intensified the interest when his own behavior came under scrutiny only a few years later. In a chapter on “Violators of the Great Taboo,” Rugoff examines the Beecher case as one among a series of sexual scandals of the day, including the Sickles-Key affair, in which a Congressman murdered his wife’s lover and was acquitted on grounds of temporary insanity, and the Fisk-Stokes affair, featuring blackmail, corruption, and adultery. Rugoff, *America’s Gilded Age*, 183-229.

defender at Johnson's impeachment. A former Attorney General and future Secretary of State and Senator, his rhetorical brilliance was matched by his seemingly easygoing courtroom manner.⁷⁹ Like the sentimental rhetoric used by Samuel Morris in his opening for Tilton, Evarts's deployment of sentimental strategies is profoundly oriented toward evoking a specific response from the jury:

Ah, gentlemen, you will find as we go on in this cause, and as you take it up upon its facts and compare it with known principles of human nature and human conduct, you will find at every stage of this business that the attack is not personal but against our society, against our civility, against our morality, against our religion. The attack is not that there are wolves in sheep's clothing, that vicious men dissemble and that they hide themselves under the cloak of sanctity to prowl on the society that they thus impose upon, . . . it is that the favored, approved, tried, best results of this social scheme of ours, which includes marriage, and of this religious faith of ours, which adopts Christianity, is false to the core; that the saintly man and the apostolic woman are delivered over to the lower indulgences; and that that being proved, the scheme itself is discredited and ready to be dissolved.⁸⁰

. . . .
Now gentlemen, whenever you establish the proposition that these breaches of external morality that threaten the very fabric of society, the central point, the purity of the family, can occur without preliminary moral degradation and preparation—without being accompanied by an inflammation of the low desires and the triumph of the flesh over the spirit—can be practiced with the maintenance of all the active benevolences and the exhibition of all the beautiful virtues of life, you have struck a blow not at Mr. Beecher, not at Mr. Tilton, but at your own wives and your own daughters. . . . Why do you look at the growing beauty of their face and form, and feel safe? . . . Why, all the while it may be going on in all our families, and nobody knows anything about it. What, shall we then discard all this, shall we believe that these sins come only by power against which no morality can guard, that there is no necessary connection between character and conduct; that these sins do not come from within, but that with all this purity they may arise? . . .

79. For a good discussion of Evarts's important role in nineteenth-century American law and politics, see Brainerd Dyer, *The Public Career of William Maxwell Evarts* (Berkeley and Los Angeles: Univ. of California Press, 1933). Evarts's eloquence during his long career—in court and out—is collected in three volumes in Sherman Evarts, ed., *Arguments and Speeches of William Maxwell Evarts*, 3 vols. (New York: Macmillan, 1919).

80. III 659.

We shall have to have a Wife Deposit Company, where we can leave our wives during the day, and we shall have to have some patent contrivance of paramour-proof alarms by which we can be called to the rescue when the insidious undermining of this external virtue (for there is nothing left in the world but external virtue) begins.⁸¹

What is going on beneath the wit, hyperbole, and fear mongering in these passages? Quite simply, Evarts has made each juror's refusal to countenance attacks on Henry Ward Beecher a necessary act of affirmation of the reliability of virtue and value in the juror's own life. If Beecher's alleged corruption can exist without any hint tainting his publicly available behavior, if "there is no necessary connection between character and conduct," then our own judgments, based as they are on similarly external "evidence," are unreliable, and we may well be unknowingly surrounded by diabolical confidence men, adulterous spouses, and corrupt institutions. The only way to solve the problem, argues Evarts, is to take a stand on the side of the reliability of outward appearance and to refuse even to investigate accusations that, if true, would undermine the assumptions that prop up our own lives. What this argument does is to make the "sentimental typology of conduct" into a principle of evidentiary evaluation, encouraging jurors to accept certain kinds of evidence as if they established a conclusive presumption with respect to character, based on sentimental logic, while rejecting other evidence outright, not because it is demonstrably false but because its existence dangerously threatens the continued viability of the sentimental world view.

Two aspects of this strategy bear closer examination. First, Evarts shifts the locus of action away from Henry Ward Beecher's alleged sexual misbehavior and into each juror's consciousness. By the time Evarts is done, it is the *juror's* values, loved ones, and principles of judgment that are being tested by this trial—the juror's security of mind that hangs precariously on the verdict, not Beecher's. As recent critics have persuasively articulated, this shift is the essence of the sentimental process in action: the sentimental text is an "act of persuasion" that works by forging a deep emotional bond of compassion and identification between the reader and the victim-hero/ine, what Philip Fisher calls an "experimental extension of the self of the reader."⁸² Having stimulated the reader to identify the sufferings of

81. III 664.

82. Fisher, 98. See also, Tompkins, *Sentimental Designs*, 122-46; Janet Todd, *Sensibility: An Introduction* (New York: Methuen, 1986); Suzanne Clark, *Sentimental Modernism: Women Writers and the Revolution of the Word* (Bloomington: Indiana Univ. Press, 1991), 19-41; and Samuels. The essays collected in Samuels's work capture quite well the current critical debates about the political effect of sentimental works (subversive and empowering, or an education in

the orphan, the slave, or the prisoner as her own, the sentimental text achieves its object by altering the reader's world view, an alteration that necessarily triggers action in the reader's life.⁸³ During the long months of testimony, defense attorneys had constructed Beecher as a man of sorrows, a suffering hero wrongly accused, whose honor, virtue, and domestic felicity were being miraculously upheld despite Tilton's diabolical charges. Jurors were continually exhorted to feel deeply for Beecher, to pity, respect, and admire him.⁸⁴ Simultaneously, Beecher's attorneys worked to link him to the jurors through a target response of intense compassion which would make them identify Beecher's plight as their own.

The sentimental reader reads to respond, finding in the narrative a blueprint for understanding and improving her own life. In its own terms, the success or failure of a sentimental text can be gauged by the intensity of the response that it elicits; its significant battleground is always, therefore, the reader's emotional field of operation. This makes the sentimental strategy splendidly useful to lawyers, for an empathic bond that leads to consonant action is precisely what final arguments always aim to construct, particularly when the attorney's goal is to win sympathy, approval, or forgiveness for his client. By suggesting that a vote for Beecher would be a vote for their own wives and daughters, Evarts offered jurors a way to "read" their own lives as reassuringly consistent narratives. Even more to the point, he made the verdict-vote for Beecher a hopeful endorsement of their loved ones' virtue. Siding with Beecher, jurors found a solution to their pre-existent anxieties, one which would stave off for a while longer their modernist anguish of isolation, the sense that what is unseen in others, and even in ourselves, is profoundly, even dangerously, inaccessible.

passivity?) and a glimpse of the broad cultural canvas in which the sentimental synthesis was played out (murder trials, educational manifestos, abolitionist rhetoric, etc.).

83. Tompkins sees radical action as a consequence of successful sentimentality, particularly a religious re-vision which makes its bid for power by "positing the kingdom of heaven on earth as a world over which women exercise ultimate control." Tompkins, *Sensational Designs*, 141. Fisher, however, insists that sentimental texts evoke a sense of powerlessness and helplessness in readers. Fisher, 98. I see sentimental texts as always crucially pushing towards real-world response, including the possibility of action in contexts broader than those presented only by religious and domestic issues. My argument therefore sides more closely with Tompkins's argument and intends to challenge Fisher's position.

84. Beecher's counsel compared Beecher, explicitly and implicitly, to Jesus (II 92, III 557, III 651). While they noted the stress on him caused by the scandal, they also took care to emphasize the outpourings of support he had received, declaring that he was "in this supreme emergence of his life, girded by millions of faithful hearts and walled to heaven by the unfaltering love and confidence of his people" (II 7). Counsel also described happy evenings spent in the Beecher home during the trial, encouraging the jury to envision the "light and joy" in his home, where the family was "fused together in one spirit of kindness and love" (III 562).

The process by which this shift is achieved is worth a closer look. One of sentimental literature's most effective rhetorical maneuvers is to rupture the narrative flow of events so that the author can make a direct appeal to the reader's most deeply felt experience, by reaching aggressively into that private store to make the reader's personal pain serve as the source of literary response.⁸⁵ When successful, the authorial intervention accomplishes not just a closer connection, but a reversal of relationship between reader and character. Typically, the process of reading temporarily extinguishes the immediacy of the reader's own world of experience and emotion, transforming the reader into a vicarious "experiencer" of the character's position and emotions. Here, however, the intervention makes the reader's *own* experience the "real" heart of the text-reader interaction, while the narrated event and characters function as paler, representational stand-ins for the reader.

The true master of this strategy was, of course, Henry Ward Beecher's sister, Harriet Beecher Stowe, whose 1852 bestseller *Uncle Tom's Cabin* continually makes the reader's deepest emotional experiences an essential component of the narrative action. Like Evarts, Stowe interrupts the flow of events in her narrative to construct new scenes in which the reader and her loved ones become characters in a narrative parallel to, but separate from, the story. A typical intervention interrupts the story of the slave Eliza's escape with her young son:

If it were *your* Harry, mother, or your Willie, that were going to be torn from you by a brutal trader, tomorrow morning,—if you had seen the man, and heard that the papers were signed and delivered and you had only from twelve o'clock till morning to make good your escape,—how fast could *you* walk? How many miles could you make in those few brief hours, with the darling at your bosom, the little sleepy head on your shoulder,—the small soft arms trustingly holding on to your neck?⁸⁶

At such moments, what happens is not simply that the reader identifies with Eliza and enters her world, but that a new story is constructed that brings the defining conditions of Eliza's predicament into the reader's world, so that it is the reader's child who must be saved, the reader's home that must be left behind, the reader's

85. See Robyn R. Warhol, *Gendered Interventions: Narrative Discourse in the Victorian Novel* (New Brunswick: Rutgers Univ. Press, 1989), which studies this phenomenon in useful detail.

86. Harriet Beecher Stowe, *Uncle Tom's Cabin, or Life Among the Lowly* (1852; London: Penguin Classics, 1981), 105 (emphasis added).

physical endurance that must be tested. If the process of transforming ourselves into fictional characters increases our empathy for Eliza, it also recasts our own future lives as open-ended narratives whose shapes are as yet undetermined. Having linked our life-stories to Eliza's story, and having triggered an anxiety about the outcome of our own stories, Stowe exploits the narrative uncertainty she has created to elicit responsive action from her readers.

Like Stowe, Evarts makes the sufferings of his client crucial components of the hypothetical horror stories he tells the jurors about their own lives, stories in which their wives' continuous adulteries can only be prevented through a "Wife Deposit Company" or a "paramour-proof alarm." Like Stowe, too, Evarts suggests that it is how the reader actively responds to the story that will determine whether or not it will come true. A vote for Beecher extinguishes one narrative of each juror's future life and constructs another one, so that a juror's vote becomes an act of defense and self-protection. An "incorrect" vote makes the juror responsible for Beecher's sins and for the immorality of modern life. Such a vote becomes an act, not just of suspicion, but of aggression.

In another moment in *Uncle Tom's Cabin*, a scene in which a grieving mother lovingly takes the clothes of her dead son from a drawer to give to Eliza's ragged son, Stowe interrupts the narrative to ask, "[O]h! mother that reads this, has there never been in your life a drawer, or a closet the opening of which has been to you like the opening of a little grave?"⁸⁷ That Stowe connects her "client," the escaping slave Eliza, to her reader through their common experiences of suffering has often been noted. What has not been sufficiently noted, however, is how this process reverses the relative roles of reader and text. Instead of the reader vicariously experiencing Mrs. Bird's grief for her dead child, it is Mrs. Bird, weeping over the little shoes and toy horse, who enacts the *reader's* grief over a similar loss. The textual narrative, though still significant in itself, becomes the occasion through which the reader comes to terms with her own sorrow, and, if the process works, achieves emotional equilibrium by shifting the locus of action to a third site, where she engages in compassionate action in the world.⁸⁸ Similarly, for those who

87. *Ibid.*, 154.

88. The enormous difference in response to such passages is, I believe, responsible for the widely varying judgments of Stowe's "authenticity" and success as a writer. Some readers resent being "manipulated" by her narrative, but Stowe's assaultive engagement should be recognized as part of her political strategy. All texts are arguably empty until "made" by reading, but Stowe's novel, more than most, is quite literally incomplete until an involved reader constructs its potentialities. As a mother of young children, I should and do read *Uncle Tom's Cabin* differently from the unmarried college students to whom I have taught it. This is not a sign of the text's inadequacy, but of its very particular brand of openness.

respond to Evarts's appeal, Beecher's ordeal becomes a performative enactment of each juror's anxieties and an occasion for resolving them.

The second strand of Evarts's strategy is his reformulation of the "mutual confidence" paradigm described in W. M. Best's treatise on evidence, from a two-sided model in which truth tellers and truth believers cooperate to enable the production of society, into a one-sided line of cause and effect, in which belief alone is both necessary and sufficient to do the job. Whether or not one person tells the truth, it is his interlocutor's obligation to believe him. Best's description of the "natural impulse" toward truth contained two reciprocal elements: the impulse to *tell* the truth and the willingness to *believe* that what we are told is true. In Best's system, of course, both are necessary for any mutual confidence to arise. It is precisely because society is grounded on the near-universality of both truth telling and truth believing that the punishment of the few liars who appear is no threat to the rest of the populace. Rather, the litigative quest for falsehood is reassuring, because the ritual identification and expulsion of unnaturally false speakers guarantees that those who are left can be trusted. In Evarts's reformulation, however, the coordinate requirement of the prevalence of truth telling by others has simply been erased. No suggestion is made that the juridical task includes a tough analysis of competing testimonies to determine which ones are true and which ones are false. Indeed, having shifted a civilization-producing activity away from the community as a whole, where interactive relationships always include the possibility of legitimate challenge and question, and into each juror's heart and mind, there seems to be no need to venture beyond that internal realm. We can create or destroy Christianity and the security of our home life simply by believing them into virtuous existence.

Evarts argues implicitly, I suggest, that we must believe in the honesty of others *whether or not they are actually honest* because belief makes civilization possible. A faint threatening whiff of heresy lurks beneath the rhetorical surface here, insinuating the possibility that our wives, daughters, and priests are not in fact what we need them to be, but that the last thing any one of us wants to do is to confront that possibility. The question of Beecher's possible hypocrisy thus stands in for the question that cannot be asked about "our" wives and daughters, and our loud refusal to accept even the possibility that suspicions against him might be justified forecloses the threat of hidden corruption closer to home. As a litigative strategy, this is truly brilliant: it induces jurors to refuse on personal moral grounds even to consider the evidence against Beecher. It is much more effective than simply arguing that such evidence is weak or

unpersuasive (though of course Evarts also did just that, for days at a time) because, if successful, this strategy wins the case for Beecher on his reputation alone, obviating the necessity of any close juridical examination of the months of damaging, if ambiguous, testimony.

The defense employed this strategy from the outset. "What is the use of an honorable life," asked Benjamin Tracy in his opening statement for Beecher, "if it is no barrier against false accusation; if in the face of foul conspiracy, its prayers and labors, generousities and heroisms are to be counted as worse than nothing—merely the disguises of a rotten hypocrisy?"⁸⁹ Tracy's question is grounded in a paradoxical logic by which, having insisted on a transparent continuity between what is seen and what is hidden (Beecher's parishioners believed in him, he added, because they could look "through his clear eyes into his transparent soul"⁹⁰), the assumption of continuity justifies the erection of an impassable defensive "barrier" between the two spheres. Because public benevolence guarantees private virtue, the existence of such virtue in a particular case must be presumed without investigation and all accusations rejected as necessarily false.

IV. THE ANTISENTIMENTALIST CRITIQUE AND THE NARRATIVE INCLUSIVENESS OF TRIALS

If Evarts and Tracy used the strategies of sentimentality to solve the central problem of Beecher's credibility, they did so at a time and in a context that subjected such strategies to a widespread critique. This section looks at two aspects of the antisentimentalist challenge: Tilton's somewhat ambivalent attack on Beecher's conduct-as-character defense, and Twain and Warner's all-out attack on the emotional power of forensic sentimentality in *The Gilded Age*.

If we return for a moment to Halttunen's thesis about the middle-class preoccupation with the problem of hypocrisy, we note that it has two components: it identifies an *anxiety* about the possibility of being taken in by hypocritical confidence men, and it traces the development and gradual disintegration of a *solution*, the sentimental typology of conduct, which held that all forms of dress and behavior were outward signs of inner character. As the quest for apparent sincerity produced ever more formalized prescriptions, however, the artificiality of all such rule-induced behavior became increasingly obvious, and the system's "built-in tendency for self-destruction" led

89. II 91.

90. Ibid.

to its dissolution.⁹¹ Lionel Trilling's important book *Sincerity and Authenticity* traces this problem to the French Revolution's preoccupation with the hypocrisy of old French society, causing an "obsessive concern with the possible—the all too probable—hypocrisy of the individual, even of one's own self":

The Revolution brought to its highest intensity the idea of the public, and established, Dr. Hannah Arendt suggests, an ultimate antagonism between the unshadowed manifestness of the public life and the troubled ambiguity of the personal life, the darkness of man's unknowable heart. What was private and unknown might be presumed to be subversive of the public good. From this presumption grew the preoccupation with sincerity, with the necessity of expressing and guaranteeing it to the public—sincerity required a rhetoric of avowal, the demonstration of single-minded innocence through attitude and posture, exactly the role-playing in which Rousseau had found the essence of personal, ultimately of social, corruption. 'One cannot,' Andre Gide has said, 'both be sincere and seem so.'⁹²

As Americans gradually came to recognize the inherent contradictions in a system of prescriptive sincerity, they often opted for the reliability of formal social performance, allocating the "darkness of man's unknowable heart" to a private sphere beyond the ambit of social investigation. But if many Americans had come, by 1875, to admire theatricality and social performance, and to accept the idea that public and private selves might be drastically discontinuous without being diabolical, they were markedly uneasy about saying so publicly, and even more uneasy about the possibility that well-known models of morality like Beecher might be as "modern" in such matters as their most forward-looking parishioners.⁹³

91. Halttunen, 189.

92. Lionel Trilling, *Sincerity and Authenticity* (Cambridge: Harvard Univ. Press, 1971), 69-70.

93. On the acceptance of theatricality and other obviously artificial social "performances" in the decades after the Civil War, see Halttunen, 153-97. The unwillingness to make public declarations that acknowledged what was actually tolerated in private morality can be seen in virtually all of the media coverage of the Beecher-Tilton case. In *America's Gilded Age*, Rugoff usefully discusses the disparity between actual and rhetorical attitudes toward contraception, abortion, sexuality, and adultery, noting that during this era, "virtue became increasingly a matter of appearances." Rugoff, 171. Rugoff documents the widespread availability of pornography, the significant numbers of "unwed mothers," the houses of assignation where respectable couples met to commit adultery. *Ibid.*, 171-229.

Yet newspapers and magazines never seemed to tire of describing the "heinous crime" with which Beecher had been charged, and to insist with righteous indignation that, if guilty, he was fouler and blacker than any other human on earth. See, for example, *Daily Graphic*, 17 August 1874, 324; Beecher is charged with "a revolting crime or series of crimes;" *Harper's Weekly*, 17 July 1875, 574, opined that the possibility that Beecher is guilty is "so violent and improbable that it involves an almost unprecedented moral monstrosity, and adds deeper blackness to the possibility of human guilt If guilty his conduct throughout shows a depravity so exceptional as to sequester him from the human race." Ironically, the plainest speaking man of the era may

The complex attitudes toward sentimental rhetoric displayed at the Beecher trial demonstrate that such culturally defining concepts do not follow straightforward rise-and-fall trajectories, but circulate among groups over time, fading and returning in response to changing circumstances. Thus, while sentimental typology was under broad cultural attack both outside and inside the courtroom, it nevertheless retained real power for large segments of the population. It dominated the trial rhetoric of both sides in their appeals to the jury, even while the same counsel eagerly mocked the sentimental language of certain letters and documents. And, on occasion, counsel adopted strikingly inconsistent approaches to the use of sentimental strategies.

This ambivalence was most obvious in the strategically unfortunate vacillation of Theodore Tilton's attorneys. While attempting at times to challenge the logic of Beecher's conduct-as-character defense, at other moments they accepted its assumptions wholesale and tried, by offering negative rather than positive examples of his public conduct, to elicit an inference of private immorality. Thus William Beach, in his closing for Tilton, read statements from Beecher's sermons reflecting religious unorthodoxy on issues such as the doctrines of atonement and the divinity of Christ,⁹⁴ quoted Beecher as having accepted the evolutionist arguments of Darwin, and suggested to the jury that, though evidence of other sexual misbehavior could not be legally introduced, "you shouldn't assume that he had been a man entirely relieved from any suspicions of a like or previous offense."⁹⁵ Carrying the presumed connection between external and internal to its logical conclusion, Beach even argued that Beecher's plump body and full lips betrayed his licentiousness. The preacher "has never been conspicuous for self-denial and asceticism" in matters of eating, drinking and other "pleasures of the senses," he observed. Then, "reading" Beecher's body as the authentic, unfalsifiable register of an undisciplined sensuality, he announced that "every lineament of his features declares him to possess those appetites in a marked degree."⁹⁶

well have been Beecher himself. When rumors that Grover Cleveland had fathered an illegitimate child threatened to destroy his 1884 campaign for the presidency, Beecher declared: "If every man in New York State to-night, who has broken the seventh commandment, voted for Cleveland, he would be elected by 200,000 majority." *New York Times*, 8 November 1884, cited in Hibben, 307. While Hibben considers Beecher's speeches in support of Cleveland tantamount to a confession of his own transgression, Clark sees them as an assertion that his virtue was unscathed, the scandal long dead, and his reputation intact. Hibben, 305-7; C. Clark 252-54.

94. III 996-98.

95. III 1005.

96. III 844. For a similar forensic reading of the licentious body of one accused of a similar sexual offense, see Ed Cohen, "Typing Wilde: Construing the 'Desire to Appear to Be a Person Inclined to the Commission of the Gravest of All Offenses,'" *Yale Journal of Law & the*

Attempting to use the logic of Beecher's own forensic strategy against him, Tilton's attorneys argued that vulnerabilities in the preacher's "public" persona could be read as manifestations of private corruption. At the same time, however, they tried to erode the underlying power of the trope of "character." Beach asked whether,

considering . . . the rather erratic and extravagant career of Mr. Beecher as a teacher, looking at the tendencies of his thought and sentiments as delineated in his spoken words, considering the impulses of his nature, as we read them through his utterances, is he deserving of the high encomiums he has received, . . . and is he by the simple authority of his character and his word to overturn the power of demonstrative proof?"⁹⁷

Note how, by stripping Beecher's "character" of its presumptive association with affirmative teachings, thoughts, and sentiments, the word "character" itself becomes emptied of clear, easily available meaning. By the time the word appears, near the end of the sentence, it has become problematic, a consequence that effectively precludes its talismanic saving power from working to Beecher's benefit. Instead of murky arguments about "character," Beach suggests, he will offer the real goods, unambiguous and persuasive "demonstrative proof."

Beach also attempted a direct attack on character theory itself, an attack premised on the clash between the sentimental, unitary view of character and a modernist conception that assumed profound discontinuities. For Lionel Trilling, the awareness of the "ambiguity of the personal life, the darkness of man's unknowable heart," becomes the springboard into the modernist conception of the self. It divides modern man's often alienated self-consciousness from what now seems to have been a naive faith in appearances and in the easy availability of meanings. In an attempt to elicit skepticism about the inferential usefulness of evidence about Beecher's public conduct, Beach offered the Trilling-like assertion that "we cannot see the

Humanities 5 (1993), 1-49. Cohen analyzes the way that the media coverage of Oscar Wilde's "sodomy" trial contrasted Wilde's "feminized," "soft," and "grotesque" body with the Marquis of Queensbury's stalwart masculine appearance and "implacable" gaze, a contrast that "came both to personify the structures of difference through which the newspapers articulated their narratives and to represent the differences in question as the negation of middle-class male norms." *Ibid.*, 18, 15-20. Beach's "reading" of Beecher's body, like the newspaper's characterization of Wilde's, intended to prove that the preacher's "abnormal" sexuality was visible, inherent, and transparent. It also aimed, by presenting "undeniable" physical evidence of licentiousness, to demonstrate to jurors that Beecher was different than they were, outside the "middle-class male norms" that, up until the scandal, he had seemed quintessentially to represent.

97. III 1010.

heart.”⁹⁸ At the same time, however, he did not want to erode the effectiveness of his own “character” arguments, or to offend the sensibilities of more traditional jurors. He was forward-looking, but tentative: “we cannot search the secret recesses of human nature,” he declared.

We but see the superficial character in the public acts of men . . . but yet they give us no clear and satisfactory clue to the true inwardness of a man. . . . We cannot well say of a man, even one with whom we are personally acquainted, however estimable may be all his characteristics and associations, and apparent acts—we cannot after all say to him or of him, that he is a faultless human being.⁹⁹

Beach’s argument, while it stresses the discontinuity between “public acts” and “the secret recesses of human nature,” nevertheless frames the problem as one of inaccurate perception rather than of humanity’s terrifying potential for evil. It suggests that a morally unambiguous “character” exists, though we may have trouble discerning it, and it retains the sentimental vocabulary—the term “true inwardness”—to refer to that inner self. Indeed, his conclusion that a publicly virtuous man may not, after all, be “faultless” suggests that he is attempting to reassure and even to protect his listeners from the really disturbing implications of his argument. Though forensic rhetoric often adopts somewhat contradictory strategies, Beach’s closing argument seems to be at war with itself in ways that blunt its effectiveness. Unwilling to propose a consistent conception of character, either sentimental or realist, Beach tried to offer both at once. The mixture of genres sent thoroughly mixed signals, a literary conflict which may well have undercut his narrative persuasiveness.

The distrust of professed sincerity displayed by Beach is directed at the problem of evaluating individual “character,” the difficulty of making reliable inferences about the “inner” person from available data about his “outer” behavior. When the critical focus shifts from sentimentality’s role in constructing individual character to its forensic function in linking lawyers to jurors, sentimental trial rhetoric looks dangerously manipulative, marked by the “role-playing” and “social corruption” that, according to Trilling, Rousseau deplored.¹⁰⁰

At the same time that Evarts, Morris, and company were putting their faith in sentimentality’s capacity to forge powerful emotional bonds, others in American society were becoming deeply suspicious

98. Ibid.

99. III 843.

100. Trilling, 69-70.

of sentimentality's power to elicit action based on "feeling" rather than "reason," particularly when that power was exerted in juridical contexts. The antisentimentalist critique is perhaps best represented by Mark Twain and Charles Dudley Warner's 1873 novel, *The Gilded Age*, which climaxes in a devastating indictment of the dangers of forensic sentimentality, here deployed by defense counsel in an emotional murder trial. The novel was written, as Justin Kaplan has noted, "at a time when every day brought news of some revelation in the Beecher affair."¹⁰¹ Writing two years before the Beecher scandal's culminating trial, Twain and Warner seemed presciently to understand that the rhetoric of sentimentality was already profoundly on trial in America.¹⁰² By situating their critique of sentimentality at the crux of lawyer-jury interaction in a capital case, they treat the sentimental mode not as one among many ways of narrating a story's events, but as a dangerous narrative instrument of manipulation, a powerful forensic tool. A brief discussion of the novel will illustrate the widespread fear among Americans that the juridical use of sentimentality posed a profound threat to justice, law, and society.

The Gilded Age did more than provide an American era with a name tag: it images American culture as a giddy series of interlocking get-rich-quick schemes, ruled by a pervasive corruption and hypocrisy. The novel satirically demolishes the sentimental synthesis, insisting again and again that the essence of appearance is its manipulability, not its transparency. When the warm glow of a stove is revealed to be the light of a single candle, for instance, the novel's hero, Colonel Sellars, assures his freezing guest that "what you want is the *appearance* of heat, not the heat itself."¹⁰³ The plot dances through

101. Justin Kaplan, "Introduction," in *The Gilded Age: A Tale of Today* (Seattle: Univ. of Washington Press, 1968), xiv-xv. Kaplan also links *The Gilded Age* to the Credit Mobilier scandal, while French's book-length study of the novel persuasively reads it as a parody of the 1872 San Francisco murder trial of Laura Fair. Bryant Morey French, *Mark Twain and the Gilded Age* (Dallas: Southern Methodist Univ. Press, 1965), 96-116. It is also true, however, that Warner and Twain were friends of Beecher. Beecher had written the introduction to Warner's *My Summer in a Garden*, and both were members of the Nook Farm circle in Hartford, a group which also included Beecher's sisters Harriet Beecher Stowe and Isabella Beecher Hooker. In *Nook Farm: Mark Twain's Hartford Circle*, Kenneth R. Andrews asserts that "nothing else in the years between 1870 and 1875 loomed so large in Nook Farm's experience as the disaster befalling Henry Ward Beecher," and describes in detail the involvement of Twain and Warner in the unfolding scandal and the trial. Kenneth R. Andrews, *Nook Farm: Mark Twain's Hartford Circle* (Seattle: Washington Univ. Press, 1969) 35, 33-41. It is quite likely, therefore, that the unfolding scandal was very much on their minds as they co-wrote the novel at breakneck speed.

102. Though he does not analyze the novel, Paul Carter also notes its parallels to the Beecher-Tilton case, commenting briefly that "the real people in *Tilton v. Beecher* talked like the fictitious people involved in the Laura trial in Volume II of *The Gilded Age*, published two years earlier. Perhaps it was another case of life imitating art." Carter, 116.

103. Mark Twain & Charles Dudley Warner, *The Gilded Age* (1873), 53 (emphasis in original).

myriad hypocrisies; among them is the quasi-tragic story of Laura Hawkins, a beautiful orphan whose innocent childhood ends abruptly when she is seduced and abandoned by a Confederate officer. When her former lover appears years later, she follows him to New York and shoots him.

Twain and Warner present the climactic murder trial as a storytelling contest between Evarts-like lawyers for control of the jurors' melting hearts. The prosecutor, calling Laura a "fiend in the form of a beautiful woman," reminds the jurors in his opening statement that they are "citizens, husbands, perhaps fathers."¹⁰⁴ Using Stowe's and Evarts's technique of narrative interruption, Twain and Warner construct a hypothetical horror story about the jurors' own lives, which only their verdict can preclude: "They knew how insecure life had become in the metropolis. Tomorrow their own wives might be widows, their own children orphans, like the bereaved family in yonder hotel, deprived of husband and father by the hand of some murderous female."¹⁰⁵ The rhetoric of the Hawkins trial, like that of the Beecher-Tilton trial, is frequently more concerned with stimulating the juror's self-interested emotions than with presenting the "facts" of the case.

The challenge for Laura's attorney is to wrest the role of sympathetic juror-allied victim away from the dead man's family and onto Laura herself. Attorney Braham begins by flattering the jurors as "men with hearts to feel for the wrongs of which she was the victim."¹⁰⁶ He describes Laura's life:

the sport of fate and circumstances, hurried along through shifting storm and sun, bright with trusting innocence and anon black with heartless villainy, a career which moves on in love and desertion and anguish, always hovered over by the dark spectre of INSANITY,—an insanity hereditary and induced by mental torture.¹⁰⁷

He then unfolds a sentimental formulation of her life story, from her rescue as a "sweet little girl found among the panic stricken survivors" of a steamboat wreck, to the moment when the villain Selby "plucked the sweetest bud . . . and having enjoyed its odor, trampled it in the mire beneath his feet."¹⁰⁸ Spectators collapsed in tears, but Mr. Braham only "paused as if overcome by his emotions."¹⁰⁹ At the

104. *Ibid.*, 377.

105. *Ibid.*

106. *Ibid.*, 381.

107. *Ibid.*, 382.

108. *Ibid.*, 382-83.

109. *Ibid.*, 383.

trial's end, he closes with a rousing peroration, demanding for "a deluded woman rendered irrational by the most cruel wrongs . . . that justice which you and I shall need in that last dreadful hour, when death will be robbed of half its terrors if we can reflect that we have never wronged a human being."¹¹⁰ When the prosecutor makes the fatal mistake of delivering a rational closing argument, "convincing the reason without touching the feelings," the defense inevitably triumphs.¹¹¹ Laura is acquitted by reason of temporary insanity.

The novel has frequently been interpreted as an attack on abusive insanity pleas, on sentimental literature, and on the general incompetence of juries, whose "melting hearts" and "perfectly macaronian bowels of compassion" Twain had frequently ridiculed.¹¹² What has not been adequately noticed is the degree to which Twain's critique turns on the intersection of law, narrative, and sentimentality. The attack is not only that jurors are stupid, but that they display the attributes of emotional receptivity—the melting heart and easy compassion—which, minus the sneer, constitute the ideal sentimental reader. In the narrative of events before the trial, Twain presents the murder as the act of an unequivocally sane but immoral woman.¹¹³ Yet at the trial, Laura's lawyer successfully suppresses the jurors' capacity for rational deliberation and judgment by drawing them into a story of suffering, exploitation, and madness. Serious criminal trials are precisely the places where the need for detached, unimpassioned reasoning is greatest, the novel suggests, yet the sentimental tango

110. *Ibid.*, 392.

111. *Ibid.*

112. On the connection between *The Gilded Age* and Twain's attitudes toward juries and insanity pleas, see French, 96-116. For a reading of the novel as an attack on sentimental literature, see Susan K. Harris, "Four Ways to Inscribe a Mackerel: Mark Twain and Laura Hawkins," *Studies in the Novel* 21 (1989): 138-53. Twain's words are taken from a 10 March 1873 letter to the editor of the *New York Tribune* describing the "ideal criminal juror." Cited in French, 100.

113. Twain's confidence that his text demonstrates the outrageousness of the "temporary insanity" plea may be seriously misplaced. The satirical treatment of the Hawkins verdict, and Twain's well-known disdain for such pleas make it clear that he expected readers to agree that Laura's was an act of premeditated murder, committed by a wholly sane, morally corrupt woman who should be held responsible both for the murder and for her sexual "fall." This conclusion is undercut, however, by the earlier sections of the book, which construct Laura as an assemblage of sentimental *topoi*—a sympathetic character abused, betrayed, and irremediably damaged by her seducer. At bottom, the pretrial narrative of her life and lawyer Braham's sentimental formulation are not very different. Many sympathetic modern readers will reasonably connect Laura's position as sexual victim to her later loss of control and resort to violence, since Twain never accords her an inner life or an autonomous "rational" decision-making independence. A more serious attack on the gendered insanity defense would have required imaging Laura *outside* the stereotypes of female irrationality that produced the defense in the first place. See, in this connection, Edward Berenson's *The Trial of Madame Caillaux* (Berkeley and Los Angeles: Univ. California Press, 1992), which connects legal concepts of insanity at the turn of the twentieth century to the gendered, stereotypical literary and scientific discourses of the day about women and sexuality.

danced between coldly manipulative lawyer and overemotional juror vitiates, in the authors' eyes, the trial's status as a quest for truth or justice. In Twain and Warner's text, Laura Hawkins's acquittal poses an overwhelming danger to ordered society as constituted through law, precisely because sentimental storytelling works just as effectively in the jury box as in the novel-reader's living room.

Indeed, sentimentality is a great deal more dangerous in the courtroom than the home, the novel implies, because so much more is at stake: not only the fate of accused criminals, but the legitimacy of the law's judicial process for dealing with crime and disorder. Ultimately, sentimentality challenges the "mutual confidence" among men that Best's treatise identified as so necessary to a functioning, "civilized" society. Twain and Warner's "modern" antisentimentalism insists that cold reason is a better tool than warm responsiveness for evaluating the "truth" of witnesses and their stories. The emotional involvement, the personal stake in the story that Stowe and Evarts work so hard to construct in their readers and listeners, is exactly what Twain and Warner find so inimical to justice. To demonstrate the dangers of such manipulability, they play with the novel's denouement, providing first a "fictional" image of Laura shut away in a horrifying hospital for the criminally insane; then, abruptly intervening in the narrative, substituting a "true history" of her complete post-trial release from confinement; and, finally, concluding with an abrupt authorial "murder" when she dies quite suddenly of "heart disease."¹¹⁴ Readers who resent being emotionally manipulated by this narrative sleight of hand should, the novel implies, rethink the consequences of such vulnerability in legal contexts, where the fascinating storyteller may be defending a very real criminal rather than a fictional heroine.

EPILOGUE: THE TRIAL TRANSCRIPT AS MODERNIST NARRATIVE

The jury at Laura Hawkins's trial had to decide between conflicting narratives of her life, actions, and mental state. The events and characters in each party's story were virtually the same, but the unambiguous moral valence and interpretive characterization given to each were in direct opposition, as they were at the Beecher-Tilton trial. At all trials, of course, the need to make each party's story demonstrate an entitlement to prevail creates a pressure that leads to the elimination of gray areas, compromising details and moral ambiguities. Constructed, therefore, on a principle of exclusion, litigation narratives tend to reproduce sentimental paradigms of victim

114. Twain & Warner, 402-03, 422-23.

and perpetrator, plots and characters whose dynamics depend on the absolute avoidance of any moral ambiguity.¹¹⁵

Trial process as a whole, however, can never enact the unidimensional morality of sentimental fiction or melodrama, because it encompasses not only the necessarily opposing narratives of both parties, but the testimony of witnesses who often refuse to follow their lawyer-directed scripts, and the nonparty commentary of the trial judge. Thus, if each party's narrative is constructed on a principle of exclusion, the trial as a whole operates on a principle of inclusion, of multiple causation and ambiguity. Its adversarial structure foregrounds gaps, shadings, and inconsistencies—inviting constant attack, correction, and addition—and it provides at least two plausible versions of the centrally contested facts. In literary terms, complete trial transcripts therefore always pull toward realism and modernism, genres often defined by their insistence on all forms of complexity—moral, motivational, and formal. The trial's structural embrace of multiplicity makes it difficult for either party to remain untarnished; even a verdict in one party's favor at the trial's end cannot wholly erase the shadows thrown on the victor's story by the insistent adversariality of the process.

The tension between the moral binarism of sentimentality and the chiaroscuro produced by trial process can be strategically useful in planning a forensic offense. An opponent who constructs himself, as Beecher did, as a moral paragon and purely sympathetic victim, risks losing his affirmative image in one swoop if his claim to fit the heroic stereotype is persuasively undercut. Sentimental fiction disintegrates whenever extenuating circumstances muddy the moral field on which its pure victims and fiendish oppressors must perform. A sympathetic sentimental character, unlike a sympathetic realist character, cannot be victim and perpetrator simultaneously.¹¹⁶ Without challenging

115. By referring to the unambiguous moral field in which sentimental fiction is explicitly enacted, I do not mean to deny the power of such fictions to subvert, implicitly, their surface simplicity. Like the sensationalist fictions of the 1860s, sentimental novels often subtly invite different alliances than those explicitly claimed by the text. In particular, they offered female readers images of sexual and social empowerment, however necessary it may have been to "punish" such independence by the novel's end. For discussions of this complexity, see Nina Baym, *Woman's Fiction: A Guide to Novels By and About Women in America, 1820-1870* (Ithaca: Cornell Univ. Press, 1978); Lynn Pykett, *The "Improper" Feminine: The Women's Sensational Novel and the New Woman Writing* (London and New York: Routledge, 1992), and Tompkins's work.

116. The distinction highlighted here can best be understood in the context of criminal behavior. Sentimental villains—Stowe's Simon Legree, Dickens's Murdstone, Bill Sykes, or Wackford Squeers—though they may have sketchy, unloved childhoods, are not permitted to become genuinely sympathetic, or to be seen as less than responsible for their own evil. Realist fiction, however, has as a central trope the protagonist who is both murderer and victim, from Clyde Griffiths in *An American Tragedy*, to Bigger Thomas in *Native Son*, to Joe Christmas in *Light in August*. Theodore Dreiser, *An American Tragedy* (New York: Modern Library, 1953);

the basic fact that his opponent has suffered wrongs, a litigant can move that opponent out of the hero's role by showing that he has inflicted sufferings on others, or even that much of his pain indirectly results from his own misdeeds. Once jurors are detached from a stance of uncritical compassionate identification with the opponent, the way is open for a recasting of events and the presentation of a new narrative.

In a recent article, Wai Chee Dimock distinguishes the defining characteristics of the criminal law from those of the nineteenth-century novel by opposing the "frugality" of the former with the "luxury of signification" of the latter. Her analysis counterpoints the increasingly narrow legal definitions of crimes and the circumscription of allowable punishments with the "symbolic latitude" available in fiction, where appropriate rewards and punishments can be distributed outside confining legal contexts and forms.¹¹⁷ Applied to fiction, the thesis works well; indeed, *The Gilded Age* is a perfect example, as the sudden death of Laura Hawkins from "heart disease" metes out the harsh but appropriate retributive justice denied by Twain and Warner's jury of captive fools, empowering the fictive universe to achieve what criminal process in the real world cannot.

Considered in relation to the Beecher trial, however, Dimock's categories become problematic. In Dimock's analysis, law as a system is inherently exclusive, or narrowing, while the narrative products of authorial imagination are expansive, continually locating new meanings and ethical possibilities. Yet at the Beecher trial, which can be taken as a paradigm of mid-Victorian American legal process, the narratives under individual authorial control were markedly "frugal" in their ambit of signification, however infinite they may have been in absolute word count. They were unambiguous, single strains culled from multiple possibilities. But the trial process as a whole, including myriad "frugal" narratives, generated a complete transcript that displays many of the characteristics that Dimock identifies only with the expansive possibilities of fiction, and specifically with the realist

Richard Wright, *Native Son* (New York and London: Harper and Brothers, 1940); William Faulkner, *Light in August* (New York: Harrison Smith and Robert Haas, 1937). These novels invite us to see criminal behavior in a larger context of racial, class, and cultural oppression, forcing us to rethink such notions as moral judgments of "character," individual responsibility, and free will. Both Dreiser and Wright use climactic trials to contrast the morally ambiguous world created by the novel's narrative with the criminal law's reductive drive to fix all blame on a single stereotypically "evil" defendant. Their fictional trials can in turn be contrasted to an actual trial like the Beecher-Tilton trial, at which the drive for a single "answer" became diffused into multiple and competing versions of events and interpretations of documents, until the possibility of fixing the "blame" definitively was thoroughly undercut.

117. Wai Chee Dimock, "Criminal Law, Female Virtue, and the Rise of Liberalism," *Yale Journal of Law & the Humanities* 4 (1992): 223-24.

novel. As an inclusive “modern” novel, the trial transcript undercuts factual and moral certainty; surrounds each party’s narrative with alternative meanings, doubts, and possibilities; and frequently interrupts the textual flow of witness narrative to permit a variety of attacks. Indeed, to follow the analogy a step further, the transcript of this particular trial is arguably more postmodern than realistic in its refusal to provide a verdict, to close factual gaps, or to suggest the existence of an unambiguous “reality” outside the multiple and conflicting verbal representations of witnesses and lawyers. By shifting our vantage point from a consideration of individual party narratives to a reading of the six-month trial as a single text, we are forced to rethink the literary genres through which the narratives work and to construct a new and quite different textual subject.

This expanded vantage point is perhaps best represented by the national news media, whose response to the trial’s inconclusive resolution provides a fitting conclusion to my argument. The day after the trial ended, *The New York Times* published a lengthy analysis of the evidence, later published separately as a pamphlet. The Beecher-Tilton jurors may have failed to provide the closure of a unanimous verdict, but the newspaper displayed no hesitation in filling the gap. It delivered an unequivocal judgment, finding the facts strongly against Beecher, and expressing a clear belief in his guilt. Yet although convinced of Beecher’s guilt, the *Times* refused to assert Tilton’s innocence, rejecting almost wholesale the details of his self-serving narrative. Admitting that “it is a mournful sight to see a great preacher of religion resting even under the suspicion of a dark crime,” the *Times* editors declared themselves unable to “feel pity or respect” for Theodore Tilton. “That Tilton should have known of his wife’s guilt; that he should have gone on living with her; that he should even have consulted with her alleged seducer as to the paternity of one of her children, and that, finally, he should declare on this very trial that she is a ‘pure, white-souled woman’—all this puts him a long way outside of the range of public sympathy.”¹¹⁸ The newspaper’s conclusion demonstrates the ultimate inability of either party to circumscribe the narrative possibilities available to juror-readers. The very exclusivity of each side’s narrative, when juxtaposed with his opponent’s, will tend to suggest the possibility of a third narrative (or of multiple thirds) made up of some of each, and even, on occasion, of conclusions propounded by neither party. The *Times* saved its severest criticism, for instance, for Elizabeth Tilton, whom both Beecher and Tilton, for different reasons, had insisted was pure,

118. *The Beecher Trial: A Review of the Evidence*, 33.

innocent, loving, and “whole-souled.” Although not a word of direct criticism of Elizabeth had been uttered at the trial, the *Times* dismissed her as “degraded and worthless,” declaring that “a city full of such women would not be worth the trouble and misery which this one has occasioned.”¹¹⁹

119. *Ibid.*, 34.